APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5144

EDWARD LEE MCNEIL, *Petitioner,*

v.

DIRECTOR, PATUXENT INSTITUTION

ON WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

PETITION FOR CERTIORARI FILED JULY 26, 1971
CERTIORARI GRANTED DECEMBER 20, 1971

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Relevant Docket Entries

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Order of Court Sending Petitioner to Patuxent Institution for Examination and Evaluation	July 29, 1966
Appeal to Court of Appeals of Maryland	August 29, 1966
Court of Appeals Opinion Affirming Conviction	July 21, 1967
Second Petition under Post Conviction Procedure Act	January 23, 1970
Order Denying Relief and Dismissing Petition under Post Conviction Procedure Act	August 17, 1970
Application for Leave to Appeal to Court of Special Appeals of Maryland	September 17, 1970
Denial of Application for Leave to Appeal to Court of Special Appeals of Maryland	April 26, 1971

STATE OF MARYLAND

VS.

EDWARD LEE McNEIL
Ind. 2392-93-94/1966

IN THE
CRIMINAL COURT
OF
BALTIMORE CITY

Before:

HONORABLE J. HAROLD GRADY, *Judge*

APPEARANCES

On Behalf of the State:

Robert Sapero, Esquire,
Stanley Cohen, Esquire,
Assistant State's Attorneys

On Behalf of the Defendant:

Frank J. Federico, II, Esquire

Reported by: Doris E. Gaffney,
Official Court Reporter

PROCEEDINGS

THE CLERK: Edward Lee McNeil, stand, please. Mr. Federico, in Indictment 2392 the State charges attempted rape, 2393 assault and 2394 assault. On arraignment June 1st, 1966, a plea of not guilty reserving the right of Court or jury trial was entered in each indictment. Your pleas today?

MR. FEDERICO: Not guilty, Court trial.

THE CLERK: As to each?

MR. FEDERICO: As to each indictment.

THE CLERK: Thank you. Have seats.

MR. SAPERO: Ruby Mae Berry.

RUBY MAE BERRY,

a witness produced on call of the State, having first been duly sworn, according to law, was examined and testified as follows:

BAILIFF: State your name and address.

A. Ruby Berry, 103 East 23rd Street.

DIRECT EXAMINATION BY MR. SAPERO:

[3] Q. Mrs. Berry—is it Miss or Mrs?

A. Miss.

Q. Miss. I direct your attention to May 1st, 1966, about 2:20 A.M. at 103 East 23rd Street. Would you tell the Court what, if anything, unusual took place there at that time?

A. I was standing in front of my door trying to get in my apartment Mr. McNeil came from across Calvert Street.

Q. Mr. who?

A. McNeil.

Q. Indicating the Defendant, Edward Lee McNeil, seated at trial table with defense counsel. What happened, please?

A. He came up to me and said, "Miss, you mean to tell me you live here and don't have a key?" He said, "Where's your husband?" I said, "Upstairs." Meantime, standing

there, he attacked me around my neck and dragged me in the alley with his hand over my mouth when I started to scream. He had me flat on my back, trying to get between my legs with his knees.

Q. What was he doing to you?

A. Trying to rape me.

[4] Q. And did you know Mr. McNeil before this time?

A. No, sir.

Q. Had you seen him on any other occasion?

A. No, sir.

Q. Were you injured in any way as a result of this?

A. Yes, I was out of work for a week on account of my throat. I was unable to swallow.

Q. I see.

A. If it weren't for my husband heard me screaming and the officer was coming in the next alley, he would have choked me to death.

Q. You know the name of the officer?

A. No, I do not, but I can recognize him.

MR. SAPERO: All right. Witness with you.

CROSS-EXAMINATION BY MR. FEDERICO:

Q. Let's see here. Mrs. Berry, is that right?

A. That's right.

Q. You were walking home; is that what it was?

A. I was standing in front of my door.

Q. I see. What were you doing standing in front of your door?

[5] A. Trying to get in the house.

Q. Where were you coming from?

A. From my husband's nephew's house.

Q. I see. What were you doing there? Trying to get in the house?

A. Yes, knocking at the door.

Q. Oh, I see.

THE COURT: What is your address again?

A. 103 East 23rd Street.

Q. (By Mr. Federico) Was this in the evening?

A. No, it was in the morning.

THE COURT: What time of the morning?

A. I don't exactly know what time, Judge.

THE COURT: Was it daylight?

A. No, it was in the morning.

THE COURT: You mean like 6:00 o'clock?

A. No.

THE COURT: 9:00 o'clock?

A. After 2:00.

THE COURT: 2:00 o'clock in the morning?

A. I don't know exactly what time.

[6] Q. (By Mr. Federico) 2:00 o'clock in the morning? Is that what you said?

A. I guess it was after 2:00. Exactly, I don't know what time it was.

Q. After 2:00 in the morning and it wasn't dark out at all?

A. It was dark. I said morning.

Q. And you were knocking at the door going home?

A. Downstairs knocking at the door on the street.

Q. And you said Mr. McNeil approached you?

A. Yes, he did.

Q. Where was he coming from?

A. I don't know. He was coming across Calvert Street. I saw the man coming across the street. I thought he was going around his business, and then he grabbed me, dragged me in the alley, put his hand over my mouth.

Q. Grabbed you for no reason?

A. He was out in the street.

Q. He was on the street?

A. I was standing in front of the door.

Q. Did he run up to your door?

[7] A. No, he come across the street.

Q. Did he walk up to you?

A. I saw the man coming. I didn't know he was going to try to attack me. Then he dragged me in the alley, asked was I married, where my husband was at.

Q. Did you say anything to him?

A. No, I did not.

Q. He spoke to you first?

A. He said that.

Q. You didn't say anything to him about money?

A. No, I did not. I had money in my pocket. He didn't try to take my pocketbook.

Q. You didn't ask him for any money?

A. No, I did not.

Q. I see. And he just grabbed you for no reason at all?

A. Grabbed me around the neck, asked where my husband was. I said upstairs.

THE COURT: Was your husband upstairs?

A. Yes, sir. If it wasn't for my husband heard me screaming and the officer coming through the alley, he would [8] have choked me to death.

Q. (By Mr. Federico) Did Mr. McNeil say anything to you?

A. No, he just grabbed me around the neck. He had me flat on the back in the alley, with his hand on my mouth and throat, trying to get between my legs with his knees.

Q. Did he say he was going to rape you?

A. No.

Q. Did he say he was going to go to bed with you?

A. No, he did not.

Q. Did he ask if he could go to bed with you?

A. No.

Q. Any other people around?

A. No, sir.

Q. You live where?

A. 103 East 23rd Street.

Q. East 23rd Street?

A. Where I live is the alley right here (indicating).

Q. Is it dark there or light?

A. There's a light over the—you know.

Q. I see. And he dragged you around the corner?

[9] A. The alley is right here; I live here (indicating).

Q. How many feet would you say you are from the alley?

A. I don't know.

Q. Just some kind of estimate. Did he take you pretty far or a pretty short distance?

A. It was a pretty short distance.

Q. Did he carry you or just drag you?

A. Dragged me, his arm like this (indicating).

Q. Then you say he threw you on the ground?

A. Yes, right on my back and tried to get between my legs with his knees.

Q. And did he open your legs?

A. Tried his best to.

Q. Was your skirt down or up?

A. I had a dress and coat on. My coat is here now for evidence.

Q. Any of your clothes torn?

A. No, they were not.

Q. I see. And then you just yelled and screamed?

A. I screamed, trying to call my husband, and as I [10] started screaming he put his hand over my mouth.

Q. And you didn't say anything to him about money?

A. I had money; I work.

Q. I see. Have you ever been convicted of a crime?

A. No, I haven't.

Q. Never have?

A. No, sir.

MR. FEDERICO: I see. I have no further questions, your Honor.

THE COURT: Do you live in a house which is right next to the alley?

A. Yes, I do.

THE COURT: No other house in between your house and the alley?

A. No, because where I live is the laundramat right next door. The house is upstairs. It's between two alleys.

THE COURT: Your front door, are you right next to the alley?

A. Yes, on the side of the alley.

THE COURT: Did this man do anything to your clothing? [11] A. No, he did not.

THE COURT: Didn't try to pull your skirt up?

A. I had a dress on. He tried to open my legs with his knees; tried to press them open.

THE COURT: But your clothing was not up around your hips, just down around your knees?

A. That's right.

THE COURT: And you say you had been at some relatives of your husband?

A. 22nd and Calvert.

THE COURT: What were you doing there until 2:00 o'clock.

A. My husband just left. He asked was I ready to come

home and I told him no. He said when you get ready come home. He was upstairs watching television.

THE COURT: He left his relatives how long before you did?

A. Oh, about ten or fifteen minutes. He wasn't gone that long. When I got upstairs, he still had his clothes on. He hadn't gone to bed.

[12] THE COURT: When you got upstairs?

A. You know, when everything was over with; when the officer came in.

THE COURT: You say you made some noise and the officer came?

A. I was screaming and an officer heard me.

THE COURT: Where was McNeil when the officer got there?

A. Running in the next alley, right into the hands of the officer.

THE COURT: I see. And your husband didn't come downstairs.

A. He came down. You know, the officer was there at the time he came downstairs.

THE COURT: Well, I thought you said you went upstairs.

A. I mean when the officer arrested him he came down. I mean, I went downstairs. The officer requested me to identify him. He had his hands over his face, and he said, "Miss, please tell him I'm not the one."

THE COURT: My question is this. While [13] this screaming was going on, did your husband come down from your apartment?

A. He looked out the window. He said O.K. That's when he came downstairs.

THE COURT: Said O.K.?

A. Came downstairs and he got up and ran in the next alley.

THE COURT: All right.

MR. SAPERO: I have a few further questions.

RE-DIRECT EXAMINATION BY MR. SAPERO:

Q. Did you see Mr. McNeil run away?

A. Yes, he got up and ran.

Q. What made him leave?

A. By me screaming.

Q. Then he got up and started running?
A. Yes.
Q. Did you see the police arrive at that time?
A. Yes, I saw the officers.
Q. And did you see the police catch Mr. McNeil?
A. No, I did not.
Q. I see. Now, after the police did apprehend Mr. [14] McNeil and bring him back, did you observe Mr. McNeil do anything to the police officers?
A. I do not know.

MR. SAPERO: All right. I have no further questions.
THE COURT: You may step down.
MR. SAPERO: May we approach the bench, your Honor?

(OFF RECORD BENCH CONFERENCE)

MR. SAPERO: Mr. Moore, take the stand, please.

JACK MOORE,

a witness produced on call of the State, having first been duly sworn, according to law, was examined and testified as follows:

BAILIFF: State your name and address into the microphone.

A. Jack Moore, 2640 North Charles.

DIRECT EXAMINATION BY MR. SAPERO:

Q. Mr. Moore, I direct your attention to May 1st, 1966, in the early morning hours, around 2:20 A.M. approxi- [15] mately, in the vicinity of 103 East 23rd Street and also, further, in the vicinity of the 2200 block of Hargrove Street. Were you in that vicinity at that time?
A. No, sir, I was not.
Q. Did you have occasion to observe Edward Lee McNeil, the Defendant——

MR. FEDERICO: Objection, your Honor.
MR. SAPERO: Let me finish. Then you can object.
THE COURT: Finish the question.

Q. (By Mr. Sapero) Did you have occasion to observe

Edward Lee McNeil, the Defendant in this case today, struggling with a police officer on that day?

A. On that date, yes, sir.

Q. Where was that?

A. At the corner of 21st and Calvert.

Q. 21st and Calvert? And what did you do?

A. I was driving north on Calvert. I noticed two persons struggling. I observed one was an officer. I pulled the car to the side of the street, went over and assisted the officer as best I could.

[16] Q. Do you know who that officer was?

A. Yes, sir. Officer Jerome Johnson, Northern District.

Q. What happened when you went over? Is that Officer Jerome Johnson of the Northern District?

A. That's correct.

Q. Did you go over and render aid to the officer?

A. As much as I could, yes. He was trying to subdue the person.

Q. What did you do?

A. I tried to stop the Defendant from struggling with the officer; tried to hold him.

Q. And what happened during this time?

A. Well, as near as I can remember, I tried to hold the Defendant's left arm. The officer was using his night stick, and the Defendant was pushed to the ground.

Q. I see. And was Mr. McNeil finally subdued?

A. Yes, sir.

Q. And would you indicate to the Court the person who you helped Officer Jerome Johnson apprehend at that time?

A. This gentleman here (indicating).

[17] Q. Indicating the Defendant, Edward Lee McNeil. During the struggle, did you observe Mr. McNeil in any way strike Officer Johnson?

A. He was attempting to, yes, sir.

Q. Did he on any occasion actually strike Officer Johnson?

A. I couldn't say, sir. I was trying to keep from getting struck myself.

Q. I see. Well, then he was flailing his arms or something to that effect?

A. That's right.

Q. Were there any noticeable physical appearances of

the officer which indicated that he had been struck by Mr. McNeil?

A. To my observation, no.

Q. That is, was he bleeding or cut or anything?

A. I didn't see any, no, sir.

MR. SAPERO: All right. Witness with you.

CROSS-EXAMINATION BY MR. FEDERICO:

Q. Mr. Moore, you were driving up where, Calvert Street?

A. Calvert, yes, sir.

[18] Q. At 2:00 o'clock in the morning?

A. Yes, sir.

Q. What were you doing up at 2:00 o'clock in the morning?

MR. SAPERO: Objection.

THE COURT: Overruled.

A. That was a Saturday night, I was down on Charles Street over at a local bar.

Q. (By Mr. Federico) Local bar? Had you had anything to drink that night?

A. I think three beers.

Q. Three beers? Were you by yourself?

A. Yes, sir.

Q. Were you in that bar all that evening?

A. No, sir.

Q. Were you in any other bar that evening?

A. No, sir.

Q. So you were driving what—north on Calvert Street?

A. That's right.

Q. And you saw this officer standing on the corner?

A. No, sir. I saw the struggle between two persons [19] first.

Q. You saw a struggle between two persons. At that time, did you know who they were?

A. No, sir. I observed one was an officer. I had stopped at the light and turned around and saw the struggle and as I looked closer I saw one was an officer.

Q. Then you got out of the car?

A. No, sir, I pulled through the light, pulled over on the side of the street and then went back.

Q. At any time, did you see the Defendant here, Mr. McNeil, strike the officer?

A. If he didn't hit him, he was trying awfully hard.

Q. I don't care what he was trying to do. My question is did you see Mr. McNeil hit the officer?

A. No, sir.

Q. So, in other words, you just saw two people over there on the corner, is that right?

A. That's correct.

Q. And to you it looked like they were having an argument, is that right?

A. Yes, sir.

[20] Q. I see. And at no time did you ever see anyone hit the officer, is that right?

A. Yes, sir.

Q. All right. Would you say you had all your faculties about you at the time?

A. Yes, sir.

Q. Would you say you had gotten over the after effects of the three beers you had?

A. I would say so, yes, sir.

Q. In other words, you would classify yourself as being sober at the time?

A. That's right.

Q. I see. Now, have you ever been convicted of a crime?

A. No, sir.

MR. FEDERICO: I have no further questions.

MR. SAPERO: I have a further question.

RE-DIRECT EXAMINATION BY MR. SAPERO:

Q. Mr. Moore, did you hear Mr. McNeil say anything in your presence to the police officer?

A. After Mr. McNeil was subdued, he kept crying and [21] repeating, "No, Lord, no; not again."

Q. Is that all?

A. "I didn't hurt that woman." He said, "I did not hurt that woman."

Q. He said, "I did not hurt that woman"?

A. Yes, sir.

MR. SAPERO: I see. All right, no further questions.

THE COURT: After you had assisted the officer and the Defendant, McNeil, was subdued, did you leave?

A. No, sir, I stayed until I was dismissed.

THE COURT: Well, as I understand it, McNeil was taken to this girl's house. Did you go along on that trip?

A. No, sir, I did not.

THE COURT: All right, thank you.

MR. SAPERO: Thank you very much, Mr. Moore. Officer Jerome Johnson.

(No response.)

MR. SAPERO: If the Court pleases, the State [22] would offer the testimony of Officer Jerome Johnson. He has been summoned and is not in the court room at this time, and we would request a continuance in order to have Officer Johnson present to testify, if necessary.

THE COURT: Well, that's the question—if necessary. I think perhaps the State has made out a sufficient case at this point, and if it becomes necessary to call the officer in rebuttal, you may have leave to do so.

MR. SAPERO: Very well. Then the State would rest its case in chief.

MR. FEDERICO: At this time, your Honor, I would like to make a motion for judgment of acquittal as to each and every indictment. As to the assaults on the two officers, your Honor, at this stage I don't see—

THE COURT: Well, in reference to indictment 2394 the motion is granted and the verdict is not guilty. In the other two indictments, 2392 and 2393, the motion is denied.

MR. FEDERICO: Yes, your Honor. Mr. McNeil, take the stand, please.

[23] EDWARD LEE MCNEIL,

the Defendant, having first been duly sworn, according to law, was examined and testified as follows:

BAILIFF: State your name and address into the microphone.

A. Edward McNeil, 319 East Lanvale Street.

DIRECT EXAMINATION BY MR. FEDERICO:

Q. How old are you, Mr. McNeil?

A. Nineteen.

Q. Now, how far did you go in school?

A. I graduated last year.

Q. Where did you graduate from?

A. Carver High.
Q. Carver High?
A. Yes, sir.
Q. Have you been in the Army?
A. No, sir. I was supposed to leave this year.
Q. Are you still supposed to leave?
A. Well, this I couldn't say.
Q. You couldn't say? Have you been inducted?
A. Yes, I have been inducted, yes, sir.
[24] Q. Now, are you working presently?
A. No, sir.
Q. Had you been working up to this occurrence?
A. Yes, sir.
Q. Where were you working?
A. I was working at Regal Empire Laundry.
Q. Are you married?
A. No, sir.
Q. Do you have any children?
A. No, sir.
Q. You live with your family?
A. Yes, sir.
Q. How many in your family? You have a mother and father?
A. Yes, sir.
Q. Both of them living?
A. Yes, sir.
Q. Living together?
A. Yes, sir.
Q. Have any brothers or sisters?
A. I have four brothers and three sisters.
[25] Q. I see. Do you contribute to the support of your family?
A. Yes, sir.
Q. Now directing your attention to the first day of May, you heard this lady take the stand and testify that you were walking up the street or across the street and you came up to her and you said something to her. Is this true?
A. No, sir.
Q. Tell the Court exactly what occurred. Had you ever seen this woman on this night she was talking about?
A. Yeah, I seen her after the police had grabbed me and apprehended me; after they beat me up.

Q. They beat you up?
A. Yes, sir.
Q. How did they beat you up?
A. They beat me up all in my head.
Q. Did they grab you?
A. Yes, sir.
Q. Where did they grab you?
A. First time they grabbed me was on 21st Street on my way home from a party. They started asking me a lot of [26] questions and I guess I wasn't answering them right, I guess, and the man told me that I was a smart guy and he told me to put my hands on the car and he started searching me and came out of my pocket with my money. He asked where I got it from. I told him it was none of his business. He told me he was sick of me being smart with him; told me get in the car. I told him I wasn't getting in because I didn't do nothing.
Q. When the two officers approached you, did they tell you why they wanted to talk to you?
A. No, sir.
Q. Were you running at the time?
A. No, sir.
Q. Were you walking fast?
A. No, sir.
Q. You testified you were coming from a party?
A. Yes, sir.
Q. Where was that party?
A. 21st Street.
Q. And how long were you at the party?
A. I was at the party about three hours or three [27] ~~and a~~ half.
Q. Had you had anything to drink at the party?
A. No, sir.
Q. Do you drink?
A. No, sir.
Q. I see. And where were you walking?
A. I was walking on 21st Street, getting ready to go down to St. Paul Street going home.
Q. Had you had a date with you that night?
A. A date? Oh, it was some girls at the party, but it wasn't necessarily a date.
Q. I see. Now, you heard this woman testify you came

up to her when she was trying to get in her house, didn't you?

A. That's what she said.

Q. And you grabbed her around the neck. You heard her testify as to that?

A. Yes, sir.

Q. You heard her testify you dragged her around the side of the house and into an alley?

A. Yes, sir.

[28] Q. And you jumped on top of her?

A. Yes, sir.

Q. Now, is this true or not true?

A. Not true.

Q. So now the first time you claim you have seen this woman was when the officers picked you up and took you back to her house?

A. They never took me to her house. They had me on 22nd Street. They had me on the ground and beat me up, and they had me in a cruiser. They never took me to her house.

Q. I see. Did they have you standing on the corner?

A. Had me on the cruiser.

Q. Did you ever hit any of these officers?

A. No, sir.

Q. Would you ever hit an officer?

A. No, sir, I respect officers.

Q. You respect the law?

A. Not these two.

Q. Well, now, you heard this man testify, Mr. Moore, that he came up. Did you ever see Mr. Moore?

A. I saw him when he came up.

[29] Q. What did he do?

A. Well, when he came up, I asked him to help me. I thought the officer on top of me was crazy. He was hitting me in the head. I didn't know what for. I was crying and bleeding. He didn't pay any attention. The officer told him to call the patrol wagon and I guess he went across the street and called the wagon.

Q. Did Mr. Moore touch you?

A. No, sir.

Q. I see. Now, have you ever been convicted of a crime before?

A. No, sir.
Q. Never have been?
A. No, sir.
Q. You sure of that? Have you ever gotten any time?
A. No, sir.
Q. Never got a suspended sentence or anything?
A. Probation before a verdict on a charge before.
Q. What charge was that?
A. It was assault and robbery—attempted rape. I mean, assault and rape and assault and robbery.
[30] Q. Probation without verdict?
A. Yes, sir.
Q. Is there anything else you would like to tell the Judge about this?
A. I would like to say they beat me up for no reason at all. I got sixteen or eighteen stitches in my head.
Q. Where in your head?
A. Right up here in the top of my head and over here, (indicating). You can see the scars.
Q. Are you in jail now? Have you been in jail?
A. Yes, sir, I been there all this time.
Q. You like it over there?
A. No, sir.
Q. Now, this man over here is going to ask you some questions. You sit there and answer him, you hear?
A. Yes, sir.

MR. FEDERICO: O.K.

CROSS-EXAMINATION BY MR. SAPERO:

Q. Now, Mr. McNeil, how far away is the place where you were apprehended by the police from 103 East 23rd Street?
A. I don't know. I don't know where 103 East 23rd
[31] Street is.
Q. You know where 23rd Street is?
A. Yes, sir.
Q. You know where the 100 block of 23rd is?
A. Not right off.
Q. Have you ever been on 23rd Street?
A. Not that way. Going up towards Greenmount Avenue, I been across to the Recreation Center.
Q. Where was that party you had been to?

A. 21st Street.

Q. Where?

A. 21st Street.

Q. On 21st Street?

A. Yes, sir.

Q. What hundred block?

A. It was below St. Paul Street.

Q. You know what hundred block it was?

A. No, sir. I didn't pay any attention to the house number.

Q. And where did you live?

A. 319 East Lanvale Street.

[32] Q. How far away is that from 23rd Street?

A. I'll say about a good six or seven blocks.

Q. Six or seven blocks. And you were on your way home?

A. Yes, sir.

Q. Now, when the police observed you, what were you doing?

A. I was walking up 21st Street getting ready to go down St. Paul Street.

Q. Had you been walking in any alleys that night?

A. No, sir.

Q. Now, when the police put you under arrest, why didn't you go with the police officer?

A. Because I hadn't done anything.

Q. And what did you then do? Try to break away?

A. No, I didn't try to break away. I stood there. Only time I was broke away was when the officer hit me in the back of the head with a night stick. I got scared and ran.

Q. Were you standing there and the officer hit you?

A. No, he was questioning me first, the one standing [33] in front of me, and the one behind me, after he grabbed me and tried to force me in the patrol car, I jerked away from him. I fell back on him. He pushed me up and took his stick out and hit me in the head. That's when I broke and ran.

Q. When did Mr. Jack Moore get to the place where you were apprehended? How long after the police officer stopped you?

A. Ten or fifteen minutes. No, about five or ten minutes.

Q. Five or ten minutes?

A. Yes, sir.

Q. Well, did the officer strike you just before Mr. Moore came up or immediately after stopping you?

A. He was—immediately after stopping me?

Q. When he first stopped you, he didn't walk up and strike you, did he?

A. No, sir.

Q. He started asking you questions, is that right?

A. Yes, sir.

Q. And when was it that he struck you? After Mr. Moore got to the scene where you were?

[34] A. No, he struck me before Mr. Moore was anywhere around.

Q. Then you started running away?

A. Yes, sir.

Q. Did he strike you at that time from the front or the back, the first time that you say he struck you?

A. From the back.

Q. He struck you from the back?

A. Yes, sir.

Q. Was he holding you in any way?

A. He wasn't holding me. He pushed me.

Q. I can't hear you.

A. I fell back on him and he pushed me up and then hit me.

Q. Then what did you do?

A. I ran.

Q. He didn't have his hand around your belt?

A. No, sir.

Q. At any time?

A. No, sir.

Q. Now, are you presently on probation?

[35] A. No, sir.

Q. You are not on probation?

A. No, sir. I was given probation before verdict, but it wasn't any—

Q. How long ago was that?

A. About two or three months.

Q. Was that uptown here?

A. Yes, sir.

Q. Who was the Judge?

A. Judge Byrnes.

Q. Was that on those various charges that you just told us about?

Q. Assault and robbery?

A. Yes, sir.

Q. And rape?

A. Yes, sir.

Q. Was anyone else involved in that particular case?

A. Was anyone else?

Q. Yes.

A. You mean did I have another co-defendant? Yes, sir.

[36] Q. How many others? Just one?

A. Yes, sir.

Q. Now, did you say, in the presence of Mr. Jack Moore, who testified today, when he was present after the police officer had apprehended you that "I didn't hurt her; I didn't hurt her"?

A. No, sir.

Q. Then, did you say that, "I didn't hurt the woman", or something like that?

A. No, sir.

Q. You said that at no time in his presence, is that right?

A. I didn't say it at all.

Q. You didn't say that at all?

A. No, sir.

Q. Then you would contend that Mr. Moore is lying, is that correct?

A. He has to be.

Q. Now, did you make any attempt to grab the police officer's revolver when you were in the struggle?

A. No, sir. The only thing I was trying to do was [37] get away from him because he was beating in my head like he was crazy.

Q. Do you recall striking Mr. Moore?

A. I didn't strike anybody at any time.

Q. Even when he was trying to subdue you?

A. He didn't put his hands on me.

MR. SAPERO: I have no further questions.

RE-DIRECT EXAMINATION BY MR. FEDERICO:

Q. Let me ask you this. Were you excited when all this was going on?

A. I was fighting; I was scared.

Q. You could have said anything at that time, couldn't you?

A. Probably so. He was beating me in the head. I probably was delirious after being beat in the head.

Q. You testified that you don't recall saying any thing about this woman?

A. No, not at any time.

Q. Would you have remembered if you did?

A. Yes, sir, now I would remember. I remember everything that happened that night.

[38] MR. FEDERICO: That's all.

THE COURT: Well now, you say you remember everything that happened that night? You were at a party on 21st Street?

A. Yes, sir.

THE COURT: Whose house was it?

A. It was a girl's house. I don't know her name.

THE COURT: Where was the house?

A. It was below St. Paul Street.

THE COURT: What do you mean by below St. Paul Street?

A. When I left the house—I don't know the address of the house, but I was coming towards St. Paul Street.

THE COURT: You know where Calvert Street is?

A. Yes, sir.

THE COURT: You know where Charles Street is?

A. Yes, sir.

THE COURT: You know where St. Paul is?

A. Yes, sir.

[39] THE COURT: Was this house between Charles and St. Paul?

A. Yes, sir.

THE COURT: Between Charles and St. Paul?

A. Yes, sir.

THE COURT: You sure?

A. I think so.

THE COURT: All right. When you came out of the house, which way did you go?

A. I was walking on 21st Street.

THE COURT: In which direction?

A. I was walking east on 21st Street.

THE COURT: Did you cross St. Paul Street?

A. No, I was about to go down St. Paul Street.

THE COURT: You were still between Charles and St. Paul when the police first approached you?

A. No, I was on St. Paul Street ready to go down. I was on the corner of 21st and St. Paul about to go down St. Paul Street.

THE COURT: And that's where the police first came in touch with you?

[40] A. Yes, sir.

THE COURT: Well then, later on did you wind up at 21st and Calvert?

A. I wound up on 22nd and Calvert.

THE COURT: After the police had you in the radio car, did you say they drove you around to some house?

A. They never drove me to any house. They had me on 22nd Street in a cruising patrol that came and they put me in the cruiser.

THE COURT: Then where?

A. I went to the hospital to get my head sewed up.

THE COURT: Then where?

A. To the station house.

THE COURT: Did you ever see this lady, this Ruby Mae Berry, that testified here?

A. I saw her at the station house.

THE COURT: Same night?

A. No, sir.

THE COURT: How much later?

A. That Sunday.

[41] THE COURT: What day of the week was it you got arrested?

A. I got arrested on Saturday.

THE COURT: Saturday night or Sunday morning?

A. Yes, sir.

THE COURT: And you saw her at the police station what time of day on Sunday?

A. I think it was 3:00 o'clock.

THE COURT: And your testimony is that is the first time you ever saw the lady?

A. Yes, sir.

THE COURT: Never saw her on the street on 23rd Street?

A. No, sir.

THE COURT: Never saw her anywhere near Calvert Street?

A. No, sir.

THE COURT: All right, that's all.

MR. FEDERICO: Step down, Mr. McNeil. At this time, your Honor, I would like to renew my motions.

[42] THE COURT: Is that the Defendant's case? I'd like to recall Mrs. Berry for a few minutes.

MR. SAPERO: Mrs. Berry.

RUBY MAE BERRY,

having been previously sworn, resumed the stand and further testified as follows:

BAILIFF: Just state your name.

A. Ruby Mae Berry, 103 East 23rd Street.

THE COURT: Now, this address at which you live is near what street, what cross street?

A. Calvert Street.

THE COURT: Near Calvert Street?

A. Between Calvert and St. Paul, but it's more towards Calvert.

THE COURT: Now, when you were coming to your home, what street did you walk on?

A. I didn't come down the street. I came through the little alley. You know, it's two alleys by my house. I came through the alley.

THE COURT: Were you coming south, from [43] like 24th?

A. I was coming straight down 22nd Street—yeah, 22nd Street.

THE COURT: You crossed 22nd Street?

A. Yes.

THE COURT: From what other street? Where did you get on 22nd Street?

A. The houses are on 22nd Street near Calvert. I came—

THE COURT: What house?

A. The One—

THE COURT: The house you were visiting?

A. Yeah, and my husband was there too.

THE COURT: You came down an alley behind—

A. I came straight across Calvert—I mean 22nd, and the first—second alley and came towards my house.

THE COURT: So you came through an alley from 22nd to 23rd?

A. 22nd Street, it's—I mean, it's light there. It was no one following me.

THE COURT: But your house is on 23rd?

[44] A. Yeah, but I came—the way the street is, I came straight down 22nd Street and through the side street, an alley there. My house is here—that's 23rd (indicating).

THE COURT: So you went through an alley from 22nd Street to 23rd Street.

A. Yeah, uh huh.

THE COURT: To get to your house. Now then, you told us about this person grabbing you.

A. Yes, in front of my door.

THE COURT: Is your house on the north side of 23rd Street or the south side?

A. I believe it's the south side. I don't know too much about it.

THE COURT: What's across the street from you?

A. What's across the street from me? Red Cross.

THE COURT: Red Cross. Now, you say that this man, after your husband looked out of the window, he started running?

A. He jumped from on top of me and run into the next alley.

[45] THE COURT: Which way was he running?

A. I guess—I think it was north.

THE COURT: You know where 22nd Street is?

A. Sure I do.

THE COURT: Do you know where 24th Street is?

A. Sure.

THE COURT: 24th Street is north of 23rd.

A. Yes.

THE COURT: And 22nd Street is south of 23rd. Now, when he ran, did he run toward 22nd Street or 24th Street?

A. 22nd.

THE COURT: And through an alley?

A. That's right.

THE COURT: And the alley is between what streets?

A. Between St. Paul and—St. Paul and 22nd. It runs right straight across 22nd Street; both alleys does.

THE COURT: Is it between St. Paul and Calvert or between St. Paul and Charles?

[46] A. St. Paul and Calvert. It's nowhere near Charles.

THE COURT: All right. Now, you say when the police—that sometime later after he ran away he came back to your house?

A. The police had him in the—you know, the cruiser. He was bleeding. He said, "Miss, please tell him I'm not the one."

THE COURT: What happened? They came to your house?

A. To identify him.

THE COURT: And you were upstairs?

A. I was downstairs at the door in front of my house with my husband.

THE COURT: What did you do?

A. He asked me to identify is that the one. I said, "Yes, Officer".

THE COURT: You went and looked in the car, I guess?

A. I looked in the car. He was standing up, you know. They opened the back door and asked me is that the one. I said yes, and he was bleeding, with his hand over his face.

[47] THE COURT: How are you sure it was the same one?

A. That's the same man, definitely. That's him. He had gray pants on. I got a good look at his face.

THE COURT: All right, that's all. Any questions, gentlemen?

MR. FEDERICO: No questions.

MR. SAPERO: No further questions.

THE COURT: All right, you may step down.

MR. FEDERICO: Your Honor, at this time, I would like to renew my motion for judgment of acquittal.

THE COURT: I think I'm going to grant the State the right they mentioned earlier to continue the case with reference to any other witnesses they may wish to produce tomorrow morning. Can you arrange it for tomorrow?

MR. SAPERO: Yes, your Honor.

THE COURT: The case will be continued tomorrow morning at 10:00 o'clock.

MR. FEDERICO: Yes, your Honor.

[48] July 13, 1966

PROCEEDINGS

THE CLERK: Edward Lee McNeil, Mr. Federico, Indictments 2392, 93 and 94. These cases are continued from yesterday. Have seats, please.

MR. SAPERO: Officer Johnson.

JEROME JOHNSON,

a witness produced on call of the State, having first been duly sworn, according to law, was examined and testified as follows:

BAILIFF: State your name and assignment, please sir.

A. Officer Jerome Johnson, Northern District.

DIRECT EXAMINATION BY MR. SAPERO:

Q. Officer Johnson, Edward Lee McNeil, the Defendant in this case, testified yesterday that when you were in pursuit of him with regard to an offense which took place at 103 East 23rd Street on May 1st, 1966, at about 2:20 A.M.—

MR. FEDERICO: Your Honor, I'm going to have to object to all this.

[49] THE COURT: The question is very leading. I'll have to sustain the objection.

MR. SAPERO: This is rebuttal. I'm trying to limit my question. I can give an overall question and have the witness answer.

THE COURT: I think we should just find out what the Officer's participation in the case was.

Q. (By Mr. Sapero) I direct your attention to May 1st, 1966, at about 2:20 A.M. at Hargrove and East 23rd Street. Tell the Court what, if anything, unusual took place there at that time.

A. Yes, sir. At about 2:21 A.M. on May 1st, working 502 car in company with Officer Richard Hax, we were cruising in the vicinity of 22nd and St. Paul. We heard some woman screaming for help, put the headlights out on the car and proceeded north on Hargrove Street when we observed a male running toward the car. We stopped the car as we

put the headlights on and stopped the Defendant, McNeil, here.

Q. Do you see him in the court room?

A. Right here (indicating).

Q. For the record, the witness indicates the Defendant, [50] Edward Lee McNeil, seated at trial table with defense counsel. What happened?

A. As Officer Hax got out and stopped the Defendant, McNeil, he was questioning him. At that time, McNeil shouted that he hadn't hurt anyone or didn't do anything to this woman. His clothes were disarranged, his trousers unzipped in the front. At the time, he struck Officer Hax, knocked him back against the radio car and continued to run south on Hargrove Alley. Officer Hax and I started in pursuit of him. Officer Hax returned to get the automobile and I chased the Defendant south on Hargrove to 22nd Street, when we cut over a half block into a smaller alley and through this alley to 21st and Calvert Street where the Defendant was tiring and fell in the middle of the street. As I approached him, I grabbed him by the shirt. At this time, he swung around, struck me in the face and in the chest and then the struggle began. Both of us were on the ground rolling around. At this time, my revolver became dislodged from the holster and was lying five or six feet from where the struggle was taking place. McNeil was crawling in the direction of the revolver. Both of us made an attempt to [51] get the revolver. At this time, I struck the Defendant several times with the night stick to apprehend him. I was able to regain the revolver, put it back in the holster and held him on the ground. A citizen came to my aid and helped me hold him on the ground—one Jack Moore, 2102 North Calvert Street—right on the corner. By this time, the citizen called assist an officer and the cruising patrol responded. The Defendant was on the way to Union Memorial Hospital when we received a call to return to 103 East 23rd Street, where the victim of this case positively identified him as the subject that assaulted her.

Q. You are referring to one Ruby Mae Berry?

A. That's correct.

MR. SAPERO: All right. Witness with you.

CROSS-EXAMINATION BY MR. FEDERICO:

Q. Officer, what are you reading there?

A. These are my notes.

Q. Your notes?

A. Yes, sir.

Q. Did you type those yourself?

A. Yes, sir.

[52] Q. Nobody else's notes?

A. No.

Q. I see. Now, did Mr. McNeil have a scuffle with you, you say, Officer?

A. That's correct.

Q. Did you get hurt in the scuffle?

A. Just abrasions of the knees.

Q. Did he seem like he was coherent at the time?

A. Well, he was very disturbed, I would say.

Q. When you approached him on the street, what did you say to him?

A. At what time?

Q. When you first saw him.

A. When he was first stopped?

Q. Yes, sir.

A. I didn't say anything to him. Officer Hax asked what he was running from, and he just continued to yell, "I didn't hurt the woman; I didn't hurt the woman." That's all he said. That's when he struck Officer Hax and ran south on Hargrove Street.

Q. In other words, he said this before you said any-[53] thing to him about anything?

A. That's correct. Just when he was stopped, that's when he began to yell this.

Q. Was he walking down the street?

A. He was running.

Q. Running down the street?

A. Yes.

Q. He was just yelling this out of a clear blue sky?

A. No, he yelled that as he was speaking to the officer.

Q. Oh, I see. Did he start a fight with you, would you say?

A. I would call it more than a fight.

Q. You would?

A. Yes, I would.

Q. Now, once you had him under control, you went back to Mrs. Berry's house, is that correct?

A. In front of her house, 103 East 23rd.
Q. Did you then take Mr. McNeil in to the—
A. Mr. McNeil went to Union Memorial Hospital.
Q. I see. And did he make any statement to you at all?
[54] A. No, he didn't make a statement.
Q. How are you feeling today?
A. Oh, I'm fine.
Q. In good shape?
A. Fine.

MR. FEDERICO: No further questions, your Honor.
MR. SAPERO: I have one further question.

RE-DIRECT EXAMINATION BY MR. SAPERO:

Q. Now, Officer, with regard to the address of 103 East 23rd Street, where the offense took place, what would you say would be the distance from there to where you first observed the Defendant, Edward Lee McNeil, and also the distance from there to the place where you subsequently apprehended him?

A. Well, it was about a hundred feet west on 23rd Street and then he was stopped about two hundred feet south on Hargrove. Then, after the chase, it was approximately two and a half blocks.

Q. So, initially, it was within a half block of 103 East 23rd Street?
[55] A. That's correct.
Q. And when you actually did subdue him, it was about two blocks away?
A. Right.

MR. SAPERO: No further questions.
THE COURT: Officer, you were cruising, as I understand it, on 22nd Street?
A. In the vicinity of 22nd and St. Paul, your Honor.
THE COURT: And you heard some screams?
A. Yes, sir, we heard a woman screaming very loudly.
THE COURT: Where did your automobile go after you heard the screams?
A. In the direction of the screaming, which was north on Hargrove toward 23rd.
THE COURT: You turned the automobile north on Hargrove?

A. That 's correct, off 22nd.

THE COURT: Toward 23rd?

A. Yes, sir.

THE COURT: And it is your testimony at that time you saw this young man coming south on Hargrove?

[56] A. Just about to the top of Hargrove Street, where we would come on to 23rd, we observed him turn the corner running very fast.

THE COURT: Did you follow him on foot?

A. No, sir, he ran right into the car. We had the headlights out. As he approached, we put the lights on and got out.

THE COURT: Then he was stopped and then he got away?

A. That 's correct.

THE COURT: In what direction did he go then? South on Hargrove?

A. South on Hargrove.

THE COURT: Were you chasing him on foot or the other officer?

A. I was, yes, sir.

THE COURT: I see. All right, that 's all.

MR. SAPERO: Thank you, Officer.

THE COURT: Oh, one other question. During the time you were chasing him, did you lose sight of [57] him at any time?

A. No, sir, at no time.

THE COURT: Thank you.

MR. SAPERO: That would be the State's case, if the Court pleases.

MR. FEDERICO: Your Honor, I would like to make a motion for judgment of acquittal for the record as to the two remaining indictments, 2393 and 2392. As to 2392 your Honor, I don't think there has been any evidence before the Court as to the first count of the indictment, the intent then and there feloniously to ravish and carnally know her forcibly and against her will.

THE COURT: The motion is denied in 2392 as to both counts and in 2393 as to the one count in the indictment. Any additional testimony you wish to offer?

MR. FEDERICO: None whatsoever, your Honor.

THE COURT: Do you wish to be heard on the verdict?

MR. FEDERICO: If it 's permissible, I would like to call the prosecuting witness back to the stand.

THE COURT: Very well.

[58] RUBY MAE BERRY,

having been previously sworn, resumed the stand and further testified as follows:

BAILIFF: Just be seated. You're still under oath. State your name for the record.

A. Ruby Mae Berry, 103 East 23rd Street.

RE-CROSS-EXAMINATION BY MR. FEDERICO:

Q. Mrs. Berry, you testified yesterday that Mr. McNeil approached you while you were going into the front of your house.

A. That's right.

Q. And he placed his hands around your neck or mouth and dragged you off into the alley.

A. That's right.

Q. Well, you also testified you screamed and your husband heard you?

A. Yes, sir.

Q. He looked out the window?

A. Yes.

Q. Well, how could anyone hear you if the Defendant had his hand across your mouth?

[59] A. I said he grabbed me around my neck. I started screaming. He put his hand over my mouth.

Q. I see. And did you still remain to scream?

A. Trying to scream, to call my husband, but he was still choking me.

Q. I see, but you didn't have any problem screaming?

A. Did I have any problem screaming? No, sir.

MR. FEDERICO: No further questions.

THE COURT: Mrs. Berry, during the time that this man was with you, did he use any language concerning any sexual activity?

A. No, sir.

THE COURT: Did you have an opportunity to observe whether or not his clothing was disarranged?

A. No, sir.

THE COURT: All right, that's all. You may step down.

MR. FEDERICO: I will submit, your Honor.

THE COURT: Well, I think the case is proven beyond any reasonable doubt with reference to the purpose of the

assault and also as to the identity of the [60] Defendant, so the verdict in 2392 is guilty generally and in 2393 is guilty. Now, there was some reference made yesterday to the fact that this boy is on probation, although I got no details about it. Is that true?

MR. SAPERO: If the Court pleases, may we approach the bench on that, your Honor?

(OFF RECORD BENCH CONFERENCE)

THE COURT: While the Court records do not reflect a conviction on any previous charge, I feel from what I know about this young man that a psychiatric report is indicated. The matter will be held sub curia and referred to the Medical Department for a psychiatric evaluation.

MR. FEDERICO: Thank you, your Honor.

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[61] July 29, 1966

PROCEEDINGS

THE CLERK: Edward Lee McNeil, Mr. Federico.

THE COURT: Anything you wish to say before disposition?

MR. FEDERICO: Your Honor, as the Court will recall, Mr. McNeil is a young man, nineteen years of age. He didn't go too far in school. He was employed at the time this incident occurred and was contributing to the support of his family. He was, as the Court is well aware, found not guilty on one of the charges.

THE COURT: What was he found not guilty of?

MR. FEDERICO: Assault of one of the police officers, your Honor.

THE COURT: Well, we have him here on two cases—attempted rape and assault on a police officer.

MR. FEDERICO: Yes, your Honor. There were two assault on police officers.

THE COURT: This is Jerome Johnson, police officer.

[62] MR. FEDERICO: Yes, your Honor.

THE COURT: Anything you want to say about the disposition of the case?

THE DEFENDANT: I'd like to be given a chance to help out my family.

THE COURT: Anything else?

MR. FEDERICO: Nothing further, your Honor. We will submit at this time.

THE COURT: The sentence in indictment 2392 is not more than five years in the Maryland Correctional Institution at Hagerstown; in 2393 not more than one year in the Maryland Correctional Institution in Hagerstown. The Defendant will be referred to the Patuxent Institution for evaluation and treatment, if necessary.

MR. COHEN: Those to run concurrently or consecutively?

THE COURT: Concurrently.

STATE OF MARYLAND, EX REL. EDWARD LEE MCNEIL	IN THE CRIMINAL COURT OF BALTIMORE
VS.	Ind. No. 2392, 2393
PATUXENT INSTITUTION	P.C.P.A. No. 1452

ORDER DENYING RELIEF UNDER THE UNIFORM POST CONVICTION PROCEDURE ACT

THOMAS, J.

The petitioner, Edward Lee McNeil was found guilty on July 17, 1966 in the Criminal Court of Baltimore by Judge J. Harold Grady, presiding without a jury of assault with intent to rape and assault on a police officer. On July 29, 1966, the petitioner was sentenced to not more than five years imprisonment for assault with intent to rape and not more than one year for assault on a police officer, the sentences to run concurrently. On August 29, 1966 an appeal was taken to the Court of Special Appeals of Maryland. On July 21, 1967, the Court of Special Appeals affirmed the judgments of the trial court.

The petitioner is presently confined at the Patuxent Institution under the Defective Delinquent Statute, Article 31B, Annotated Code of Maryland (1967).

In this his second post conviction petition, the petitioner has raised the following contentions.

1. That the petitioner's constitutional rights were violated because the State failed to produce an important State's witness.
2. That the State failed to adhere to the requisites of Article 31B, Section 5, of the Annotated Code of Maryland in that the State had not shown that there was persistent, aggravated, anti-social, or criminal behavior in the petitioner's case history.
3. That the petitioner's criminal sentence has expired.
4. That at the time of his trial, Judge Grady prejudged him.

FIRST CONTENTION—This contention is without merit; the petitioner had ample opportunity to summons anyone that he wanted. Nowhere in the indictment papers does

it indicate that the petitioner summoned Officer Richard Hax. The State is not required to call any particular witnesses to prove its case, but may call whatever witnesses it may need, and need not call those which would not be helpful or would only be redundant. Since the petitioner had the opportunity to summons the officer and failed to do so, it will be deemed waived, and the petitioner may not now raise this contention. *Boucher* v. *Warden*, [redacted]Md. App. 51.

SECOND CONTENTION—The petitioner for this contention relies on Article 31B, Section 5 wherein he contends that he is being improperly held because "The State prior to sending your petitioner to Patuxent Institution, had not shown that there was persistent, aggravated, anti-social or criminal behavior in his case history." Article 31B, Section 6 of the Annotated Code of Maryland (1967) Section 6(a) states:

> "A request may be made that a person be examined for possible defective delinquency if he has been convicted and sentenced in a court of this State for a crime or offense committed on or after June 1, 1954, coming under one or more of the following categories: (1) a felony; (2) a misdemeanor punishable by imprisonment in the penitentiary; (3) a crime of violence; (4) a sex crime involving (A) Physical force or violence, (B) disparity of age between an adult and a minor, or (C) a sexual act of an uncontrolled and/or repetitive nature. * * *".

Since the crimes of assault with intent to rape, and assault on a police officer, fall into more than one of these categories, it is clear the State had the authority to send the petitioner to Patuxent for examination. The testimony shows that the defendant has not as yet been examined. This is a result of the defendant's refusal to submit to the examination and not the fault of the staff at Patuxent Institution.

A person referred to Patuxent under Section 6, Article 31B for the purpose of determining whether or not he is a defective delinquent may be detained in Patuxent until the procedures for such determination have been completed regardless of whether or not the criminal sentence has

expired, *Mullen* v. *Director*, 6 Md. App. 120. The court was therefore within its power to refer the petitioner to Patuxent and is still within the law in keeping him here until he submits to the examination and the Institution is able to make a determination.

THIRD CONTENTION—The petitioner contends that his criminal sentence has expired. In view of the court's position in the case of *Mullen* v. *Director, supra,* the court is not able to grant relief under this contention.

FOURTH CONTENTION—Petitioner here alleges that Judge J. Harold Grady pre-judged him at the time of his trial. Specifically, the court's attention is drawn to Page 22, lines 5 and 6 of the transcript where the court said, "I think perhaps the State has made out a sufficient case at this point and if it becomes necessary to call the officer in rebuttal you may have leave to do so." In reading the transcript of the trial it does not appear that Judge Grady had pre-judged the petitioner, but rather that the Judge felt that the State had presented a sufficient case. This contention is without merit.

Accordingly, it is hereby ORDERED, the petitioner having failed to present the Court with any contentions which would warrant relief, that this petition for post conviction relief be and the same is hereby denied.

/s/ Basil A. Thomas
Judge

Date: August 17, 1970

UNREPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

Application for Leave to Appeal

NO. 150

September Term, 1970

POST CONVICTION

EDWARD LEE MCNEIL

v.

DIRECTOR, PATUXENT INSTITUTION

Anderson
Morton
Orth
Thompson
Powers,
JJ.

Per Curiam

Filed: April 26, 1971

PER CURIAM

In an order filed August 17, 1970 in the Criminal Court of Baltimore, Judge Basil A. Thomas denied the relief sought by Edward Lee McNeil in his second petition under the Post Conviction Procedure Act. After a complete review of the petition, and of the papers filed with the application for leave to appeal, we find the lower court's order to be correct in rejecting each of the contentions raised in the petition. We shall deny the application for leave to appeal.

Application for Leave to Appeal Denied.

SUPREME COURT OF THE UNITED STATES

No. 71-5144, October Term, 19—

EDWARD LEE MCNEIL,

PETITIONER,

v.

DIRECTOR, PATUXENT INSTITUTION

On petition for writ of Certiorari to the Court of Special Appeals Court of the State of Maryland.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 20, 1971

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PETITIONER'S BRIEF

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5144

EDWARD LEE McNEIL,
Petitioner,

v.

DIRECTOR, PATUXENT INSTITUTION,
Respondent.

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

ORDERS AND OPINIONS BELOW

The order and opinion of the Criminal Court of Baltimore City, Maryland, denying McNeil's petition for post-conviction relief, is unreported and is printed at pages 34-36 of the Joint Appendix (hereinafter cited as J.A.). The per curiam order and opinion of the Maryland Court of Special Appeals denying leave to appeal is unreported and is printed at J.A. 37-38.

JURISDICTION

The judgment of the Maryland Court of Special Appeals denying leave to appeal was entered on April 26, 1971. J.A. 37-38. On July 26, 1971, Petitioner filed a pro se Petition for a Writ of Certiorari in this Court. The Court granted certiorari on December 20, 1971. J.A. 39. The undersigned counsel was appointed by this Court to represent Petitioner on January 24, 1972. Pursuant to Rule 34 of this Court and an agreement of the parties, the Clerk directed that Petitioner's brief be filed by April 3, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED [1]

"1. Can a citizen of the State of Maryland be administratively imprison[ed] indefinitely and possibly for life, under Article 31B of the Maryland Code without a judicial determination when [he] is not serving a criminal sentence, solely because he has invoked his Fifth Amendment right to silence?

"2. Is it a violation of the Fourteenth Amendment for the State of Maryland to disregard the specific statutory guidelines of Article 31B section (5), in referring an individual to Patuxent Institution, when there is no law for referral to Patuxent?"

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * * .

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[1] These questions are quoted verbatim from page 2 of the pro se Petition for a Writ of Certiorari filed by Petitioner on July 26, 1971. They were also adopted by the State of Maryland at page 2 of its Brief in Opposition to that Petition. Pursuant to Rule 40.1.(d)(1) of the Rules of this Court, the argument presented herein includes "every subsidiary question fairly comprised" in the questions originally presented in the pro se Petition.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * * .

The Eighth Amendment to the United States Constitution provides in pertinent part:

> * * * nor [shall] cruel and unusual punishments [be] inflicted.

The Thirteenth Amendment to the United States Constitution provides in pertinent part:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States * * * .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law* * * .

STATEMENT OF THE CASE

Introduction

On July 12-13, 1966, Petitioner Edward Lee McNeil was tried before the Criminal Court of Baltimore City, sitting without a jury, on charges of assault on two police officers and assault with intent to rape. J.A. 3, 13. McNeil took the stand and denied that he had committed the offenses. J.A. 13-23. No defense or evidence of insanity, drunkenness, drug addiction, or other lack of responsibility was offered; indeed, McNeil testified without contradiction that he had graduated from high school, had been employed at the time of his arrest, lived with his parents, and contributed to their support. J.A. 13-14. The charge of assault against one police officer was dismissed. J.A. 13. After finding McNeil guilty of the two other offenses at the conclusion of the trial, the trial judge stated, without further elaboration and despite the

fact that no psychiatric issues had been raised or suggested by either side during the trial:

> While the Court records do not reflect a conviction on any previous charge, I feel from what I know about this young man that a psychiatric report is indicated. The matter will be held sub curia and referred to the Medical Department for a psychiatric evaluation. [J.A. 32.]

Pursuant to this referral, McNeil was examined by John C. Sheehan, M.D., identified as a medical officer.

The report of the medical officer, dated July 19, 1966, found that McNeil's I.Q. (104) "is some twenty points over the average individual seen by this office"; that his "flow of thought was logical and coherent"; and that he "did not appear to have a preconceived concept of acting anti-socially * * * *." In addition, the report found, there was "no evidence of paranoid ideas or delusions," "no evidence of a psychotic distortion of thought," "no evidence of any psychotic process or organic deficit," and "no evidence of any basic thinking disorder * * * ." Notwithstanding these findings, the report, noting repeatedly that McNeil "adamantly and vehemently denies, despite the police reports, that he was involved in the offense" and that McNeil "has a limited tolerance for anxiety and stress," concluded that "I would suggest a diagnosis of personality pattern disturbance, schizoid type, which would emphasize his vulnerability to stress." McNeil's very refusal to admit any offenses in the past was treated as "a pessimistic sign that further offenses may occur." On the basis of this suggested diagnosis, the medical officer recommended that McNeil be "considered for evaluation and treatment" at the Patuxent Institution (hereinafter "Patuxent").[2] His report did not suggest what treat-

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[2]The medical officer summarized his recommendations about McNeil as follows:

> ***It is difficult to assign a diagnosis to this young man; he is not anti-social in the sense that he uses society as an enemy to be attacked. His unstable character structure does not permit

(Cont'd.)

ment, if any, would benefit McNeil, or whether any appropriate treatment would be available at Patuxent.

The suggestion that McNeil might exhibit "personality pattern disturbance, schizoid type" apparently refers to a possible diagnosis of a particular sub-category of personality disorders ("maladaptive patterns of behavior"), namely, "schizoid personality":

> This behavior pattern manifests shyness, oversensitivity, seclusiveness, avoidance of close or competitive relationships, and often eccentricity. Autistic thinking without loss of capacity to recognize reality is common, as are daydreaming and the inability to express hostility and ordinary aggressive feelings. These patients react to disturbing experiences and conflicts with apparent detachment. [American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (3d Ed. 1968) at 41, 42.]

All personality disorders are "perceptibly different in quality" from more serious disorders such as psychoses—mental functioning "sufficiently impaired to interfere grossly with [the person's] capacity to meet the ordinary demands of life"—or neuroses—anxiety and other distress symptoms which result in severe handicaps.[3]

The medical officer did not testify at McNeil's sentencing on July 29, 1966, nor was there any hearing on the report. In fact, the report was never referred to by anyone at the sentencing. J.A. 32-33. The court sentenced McNeil on the criminal charges to "not more than five years" in the Mary-

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adequate control when under stress and we do not know enough about his social life or lack of it. I would suggest a diagnosis of personality pattern disturbance, schizoid type, which would encompass his vulnerability to stress. This young man is certainly a danger to society and the rigidity of his defenses which do not permit a consideration of his offense, even after he has been found guilty, can be taken as a pessimistic sign that further offenses may occur.

[3]American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (3d Ed. 1968), at 40, 23, 39.

land Correctional Institution at Hagerstown, to run from May 12, 1966.[4] At the same time, without suspending or modifying that sentence, the trial court ordered that McNeil "be referred to the Patuxent Institution for evaluation and treatment, if necessary." J.A. 33.[5]

Statutory Basis for Referral to Patuxent

Virtually any conviction under the Maryland Code may trigger commencement of "defective delinquency" proceedings under Article 31B, which in turn may lead to suspension of the criminal sentence and confinement to Patuxent for an indeterminate period, without maximum limits. Under Article 31B, §6, a defendant convicted of any felony or certain misdemeanors may be "referred" to Patuxent for an examination prior to court determination of whether he may be classified as a "defective delinquent."[6] Referral may be initiated by request from any of the following: (1) the Department of Correction, (2) the trial prosecutor, (3) the

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[4]McNeil received concurrent sentences of not more than five years for assault with intent to rape and not more than one year for assault on a police officer. J.A. 33.

[5]On the same day, the trial judge signed a printed form ordering McNeil's examination at Patuxent. After reciting that there was "reasonable cause to believe that the Defendant may be a Defective Delinquent * * *," the form directed that the defendant be "delivered to the custody of the Director of Patuxent Institution, for observation, examination and evaluation for the purpose of determining whether or not he is a Defective Delinquent * * *," and, that "the Defendant shall remain in the custody of the Director of Patuxent Institution until such time as the Court shall have received a written report on the Defendant from the Institution and shall issue its further Order in the premises."

[6]Article 31B, § 5, defines "defective delinquent" as "an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment."

defendant, (4) defense counsel, (5) the trial court, or (6) any other court having jurisdiction over the convicted defendant. While a request for such an examination by the State must set forth the reasons for "suspecting or supposing the presence of defective delinquency," an examination request originating with the court or with the convicted defendant apparently need not set forth any reasons (Article 31B, §§ 6(b), 6(d)), and no reasons were specified by the court in the instant case. The statute does not establish any procedure by which the defendant or his counsel can contest the referral, which may lead—as is the case here— to commitment for an indefinite term exceeding the criminal sentence.

Article 31B, §6(e), provides that after a person is transferred to the custody of Patuxent, he shall remain in that Institution's custody "until such time as the procedures of [Article 31B] for the determination of whether or not said person is a defective delinquent have been completed, without regard to whether or not the criminal sentence to which he was last sentenced has expired." Under Article 31B, §7(a), the examination is made at least by a psychiatrist, a psychologist and a physician "on behalf of the institution." The institution must assemble "all pertinent information about the person to be examined," including (1) a complete statement of the crime for which the defendant has been sentenced; (2) "the circumstances of such crime," and (3) copies of any probation or other previously prepared reports describing the defendant's "social, physical, mental and psychiatric condition and history."

On the basis of all such assembled information, "plus their own personal examination and study" of the defendant, the institutional staff "shall state their findings" as to defective delinquency in a written report to the court. Article 31B, §7(a). The statute at the time of McNeil's referral required that the report be filed no later than six months from the date the person was transferred to Patuxent for examination, or before expiration of his sentence, whichever last

occurs[7]—a requirement not complied with in this case. The examination normally employs "recognized psychiatric techniques, including, among other things, a psychiatric interview and evaluation in depth, a full battery of psychological tests, full sociological and social work studies, including electroencephalographic studies, review of past history and records, including police, juvenile, penal and hospital records; and, in addition, personal interviews * * * with the accused, are held."[8] And the chief psychologist at Patuxent has testified that the personal interviews with the accused include "a series of questions to elicit and to determine the past criminal record, antisocial and criminal behavior of the individual."[9]

If the required report concludes that the convicted defendant should not be classified as a defective delinquent, he is retained in the custody of the Department of Correction under his original sentence with full credit given for the time confined at Patuxent. Article 31B, § 7 (a). If the report takes the position that the defendant should be classified as a defective delinquent, a hearing is then held

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[7] 3 Md. Code Article 31B, §7(a) (1957 ed., 1966 Supp.). The statute was amended effective July 1, 1971, to require that the report be filed no later than six months from the date the person was transferred to Patuxent, or three months before expiration of his sentence, whichever *first* occurs. 1971 Laws of Maryland, Ch. 491; 3 Md. Code Article 31B, § 7(a) (1971 Supp.). The report is thus overdue by from eleven months to five years, depending on which version of the statute is applicable.

[8] *Director v. Daniels*, 243 Md. 16, 57, 221 A.2d 397, 421, *cert. denied sub nom. Avey v. Boslow*, 385 U.S. 940 (1966).

[9] Testimony of Dr. Arthur Kandel, *Sas v. Maryland*, 295 F. Supp. 389 (D. Md. 1969), *aff'd sub nom. Tippett v. Maryland*, 436 F.2d 1153 (4th Cir.), *cert. granted sub nom. Murel v. Baltimore City Criminal Court*, 404 U.S. 999 (1971) (No. 70-5276, 1971 term) (pending). The testimony appears at page 236 of the Joint Appendix before the Fourth Circuit in *Tippett*, which has been filed as part of the record before this Court in *Murel*. (Hereinafter, said Joint Appendix is cited as "Murel J.A. 4, at ____.")

pursuant to Article 31B, § 8, at which the defendant can challenge the proposed finding. At that hearing, which can be accelerated at the defendant's request, he has the right to counsel (including appointed counsel) and trial by jury. McNeil has never received this hearing.

If the court or jury determines on a proponderance of the evidence that the defendant does meet the statutory definition, the court must "order him to be committed or returned to the institution for confinement as a defective delinquent, for an indeterminate period, without either maximum or minimum limits."[10] In that case, "the sentence for the original criminal conviction * * * shall be and remain suspended, and the defendant shall no longer be confined for any portion of said original sentence." Article 31B, § 9(b). Once so committed after hearing, the defendant can appeal the finding and otherwise petition for review (Article 31B, §§ 10-11), and Patuxent must "thoroughly re-examine" him once a year. A person committed to Patuxent after hearing can subsequently be granted parole, work release, or other leave of absence by the institution, and can be released conditionally or unconditionally on court order (or be transferred to serve the remainder of his original sentence). Article 31B, § 13. Since no hearing has ever been held to determine whether McNeil constitutes a "defective delinquent," he has been denied even those rights and privileges granted persons classified as defective delinquents after court hearing and committed to Patuxent.

Referral of McNeil in 1966

Pursuant to the court's order of July 29, McNeil was transferred to Patuxent on August 10, 1966. From that date to the present, he has remained on the "receiving tier"

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[10] Should the court or jury determine that the defendant does not constitute a defective delinquent, his period of confinement on his conviction resumes under custody of the Department of Correction, with credit given for time spent at Patuxent. Article 31B, § 9(a).

at Patuxent, with no rehabilitative treatment, solely because he has refused on at least 15 separate occasions[11] to submit to the full battery of psychiatric tests and questions which Patuxent insists on imposing before it will either file a report as to whether a convicted defendant should be classified as a "defective delinquent" or provide treatment to that person.[12]

Patuxent's initial three attempts to examine McNeil occurred while the direct appeal from his criminal conviction was pending.[13] On that appeal, McNeil contended, *inter alia*, that his conviction should be reversed because it was against the weight of the evidence (primarily his own testimony) that he had not participated in the crimes charged. It was also while this direct appeal was pending

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[11] As outlined in Exhibit A to this brief, the official Patuxent file on McNeil (File No. D-1885) lists at least 15 such occasions between 1966 and 1972 on which he refused to undergo a complete psychiatric evaluation as requested by the Patuxent staff. Apparently, on at least two occasions in January, 1970, McNeil requested a consultation with Patuxent psychiatrists, but the staff did not respond to these requests. The reason for these two requests does not appear in the record, but it may be that McNeil was attempting to avoid disciplinary action by telling the staff personally he would continue to refuse the psychiatric evaluation. See note 54, *infra*. In any event, we can assume that McNeil would not have submitted to psychiatric testing and evaluation had his requests for consultation been heeded, because when Patuxent, on its own initiative, asked McNeil to submit to testing several months later (June 9, 1970), he refused, and has continued to do so to the present date.

[12] Inmates in the diagnostic stage are not allowed to participate in the therapy program. Murel J.A. 4, at 206. See also pages 414 and 634-635 of the Joint Appendix before the Maryland Court of Appeals in *Director v. Daniels, supra*. That Joint Appendix has been filed as part of the record before this Court in *Murel v. Baltimore City Criminal Court, supra*, and is hereinafter cited as "Murel J.A. Md., at _____."

[13] The conviction was affirmed by the Court of Special Appeals of Maryland in an unreported opinion dated July 21, 1967. 1 Md. App. 697. The Court of Appeals of Maryland denied certiorari on November 6, 1967.

that the Director of Patuxent advised the Baltimore City Criminal Court by letter that the institution had been "unable to make the examination required by Section 7 of [Article 31B] because Mr. McNeil has refused to submit to testing and to other examinations."[14] This letter—copies of which were sent to the Attorney General of Maryland and to the State's Attorney for Baltimore City but *not* to McNeil or his attorney—was written eight days after the "mail censor" at Patuxent recorded in McNeil's file that McNeil had written the United States District Court in Baltimore, complaining that Patuxent had refused to determine his "defective delinquency" status, asserting that Patuxent had an obligation to make a diagnosis one way or the other with or without his cooperation, and advising the court that he had "purposefully not cooperated with the diagnostic study. because * * * this is his right."[15] The Baltimore City Criminal Court apparently took no action in response to notice from Patuxent that the institution was not planning to submit the evaluation report required by the statute, and in any event, no hearing has ever been held to determine whether McNeil was or is a defective delinquent subject to indeterminate commitment to Patuxent.

The fourth demand that McNeil undergo psychiatric tests did not occur until November 6, 1968—more than two years after McNeil had refused the third request—although the chief psychologist at Patuxent testified in the *Murel* case on May 1, 1968, that such examinations are "usually * * * repeated or followed up every six months, and sometimes more frequently." Murel J.A. 4, at 282. This fourth refusal occurred during the period that McNeil's first

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[14] The letter, dated May 23, 1967, from Harold M. Boslow, M.D., to the Honorable Albert L. Sklar, Baltimore City Criminal Court, is part of the Patuxent file (No. D-1885) on McNeil.

[15] This letter, dated May 15, 1967, from McNeil to the Honorable Roszel C. Thomsen, is reported in Patuxent File No. D-1885, on the "Progress Sheet."

petition for release under Maryland's Post Conviction Procedure Act (Md. Code, Article 27, § 645A) was pending in the Maryland Court of Special Appeals, having been denied by the Baltimore City Criminal Court.[16] In his pro se application for leave to appeal to the Court of Special Appeals, McNeil was contending, *inter alia*, that he should be released inasmuch as his arrest had been made without probable cause because the facts showed (based primarily on his own testimony) that he had not been engaged in any conduct justifying an arrest.

Ten of McNeil's remaining eleven other recorded refusals to submit to psychiatric examinations and testing, which would have delved into, among other things, the circumstances of the offenses for which he was convicted, occurred during the pendency at the trial or appellate level of his second petition for release from confinement.[17] In his second petition, prepared pro se on December 29, 1969, and filed on January 23, 1970, in the Baltimore City Criminal Court, McNeil stated:

> I have been incarcerated in Patuxent for more than (3) three years waiting for either Defective Delinquent Proceedings against me, or release from Patuxent back to the Department of Correction; neither has occurred, and it appears that if I do not myself, take it upon myself to do something, I will remain here and *"rot"* forever. [Emphasis in original.]

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[16] McNeil's application for leave to appeal to the Maryland Court of Special Appeals was denied in an unreported per curiam opinion dated November 21, 1968. 5 Md. App. 745. *McNeil v. Director*, No. 66 (Md. Ct. Spec. App., September Term, 1968).

[17] This Court granted certiorari herein on December 20, 1971, with respect to the judgment of the Maryland Court of Special Appeals (J.A. 37-38), refusing leave to appeal from denial of McNeil's second post-conviction petition for release from confinement. McNeil's one remaining recorded refusal took place on July 25, 1969, after his first petition for release from confinement had been rejected by the Maryland Court of Special Appeals and before his second petition had been filed.

However, the Baltimore City Criminal Court rejected McNeil's challenge to the failure to institute defective delinquency proceedings against him and held, in an opinion dated August 17, 1970, that the court which had convicted McNeil and sent him to Patuxent was "within the law in keeping him there until he submits to the examination and the Institution is able to make a determination." J.A. 36. The Maryland Court of Special Appeals refused leave to appeal in an unreported, one-paragraph per curiam opinion issued April 26, 1971. J.A. 37-38.

McNeil would have been released over four years ago if he had been confined at the Maryland Correctional Institution in Hagerstown and served the minimum time provided by law with respect to his sentence,[18] and he would have been automatically and unconditionally released almost one year ago had he served his full criminal sentence. Instead, he remains confined today at Patuxent, and the State promises to keep him there indefinitely—with no rehabilitative treatment or training—so long as he refuses to submit to psychiatric and psychological examinations by the Patuxent staff. On December 20, 1971, this Court granted McNeil's pro se petition for a writ of certiorari to review his confinement, which has continued even though no judicial hearing has ever been held to commit him indefinitely.

SUMMARY OF ARGUMENT

McNeil has been confined at Patuxent Institution for defective delinquents beyond his criminal sentence. No report asserting that McNeil should be classified as a "defective delinquent" has ever been filed, and no hearing as to his status as a "defective delinquent" has ever been held. To prevent just such abuse of statutes designed for the commitment of predicted offenders, this Court has

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[18] Md. Code, Article 41, § 124 (1965 ed.); Article 41, § 122 (1970 Supp.) (prisoner eligible for parole after one-fourth his sentence).

surrounded indeterminate confinement procedures—whether denominated civil or criminal—with constitutional guarantees of due process and equal protection. McNeil's continued confinement without hearing or treatment clearly violates both those constitutional rights and others listed below.

Courts have particularly insisted that due process guarantees be scrupulously observed where commitment extends beyond termination of a criminal sentence. In sharp contrast to the Maryland law, the federal statute requires a judicial hearing before a federal prisoner may be committed past his sentence. The State's insistence here that the evaluative report required by Maryland law cannot and need not be prepared unless the defendant submits to its psychiatric examination not only flouts due process guarantees requiring a hearing before indefinite confinement, but rests on the inaccurate factual assumption that answers to the staff's questions are an absolute prerequisite to an evaluative report. The State's refusal to do anything—to make an evaluative report on McNeil, to hold a judicial hearing as to his status, or to offer him rehabilitative treatment—cannot be sustained.

In addition, the privilege against self-incrimination forbids confining McNeil indefinitely at Patuxent as the price for refusing to submit to questioning by doctors and others on the Patuxent staff. The overwhelming evidence shows that the staff seeks to question each referred inmate in detail about his past criminal activities, and that his answers may incriminate him in at least four different respects, as outlined below. For the reasons discussed herein, the purpose in asking the questions, the success or failure of Patuxent as a treatment facility, and the label attached to defective delinquency proceedings are constitutionally irrelevant in assessing the substantial dangers of self-incrimination that face any inmate who answers Patuxent's questions.

ARGUMENT

There is an awful simplicity about this case. Without a hearing, McNeil was committed to Patuxent against his will and without any application on his part, for a determination of whether he should thereafter be confined for an indefinite period. When he refused to submit to testing by officials at the institution, the State continued to confine him, even after his original criminal sentence had expired, and claims in this Court the right to keep him confined forever—all without any hearing, judicial or otherwise.

The State does not claim this right because McNeil is a defective delinquent; he has never been found to be a defective delinquent by anyone. The State does not claim this right because McNeil must receive treatment; he receives no treatment at all as he is presently confined, and he will remain confined without treatment if the State's position is upheld. Instead, the State claims the right to confine him indefinitely solely because he refuses to submit to its evaluation procedure.

Even if McNeil's refusal were purely quixotic—for no reason or for no defensible reason—this indefinite confinement would be unconstitutional, since no one can be deprived of his liberty without a hearing and its attendant protections inherent in our concept of due process. But in this instance, McNeil's reason is far from quixotic. On the contrary, he refuses to submit to the institution's examinations because those who are questioning him seek incriminating information from his own mouth which can thereafter be used either to incarcerate him for crime or to brand and confine him indefinitely as a defective delinquent. It is thus the very exercise of his rights under the Fifth Amendment which the State uses to justify his confinement. The confinement is therefore doubly unconstitutional—because of a total lack of a judicial determination that he should be confined at all, and because his refusal to incriminate himself is made the basis and excuse for his continued loss of liberty.

I. McNEIL'S CONFINEMENT FOR LIFE WITHOUT A JUDICIAL HEARING VIOLATES CONSTITUTIONAL GUARANTEES.

(a) Due Process.

On July 29, 1966, the trial judge, after receiving the medical officer's report, sentenced McNeil on the assault convictions to not more than five years in the Maryland Correctional Institution at Hagerstown. As the court knew, this sentence was subject to statutory reductions for good behavior, industrial or agricultural work, and satisfactory progress in education or vocational courses,[19] and McNeil would have been eligible for parole after one-fourth the term,[20] or in a little over one year. Although the five-year sentence reflected the trial court's judgment as to the maximum period McNeil should be confined before being restored to normal life in the community, McNeil remains at Patuxent today without any judicial finding that he would constitute a danger to society if released or that he needs treatment and can receive it only while confined.

Indeed, McNeil's continued confinement—four years and eight months after his minimum sentence has expired and almost a year after his maximum sentence has expired—derives solely from the initiation of the *first step* (referral to Patuxent) in the statutory proceeding for indefinite commitment of "defective delinquents." Md. Code, Article 31B. The State has refused to comply with the second required initiating step in the statutory scheme (report by Patuxent), and asserts its right to hold McNeil for life if he will not submit to Patuxent's psychiatric examination. Based on standard mortality tables, such confinement without hearing could continue until the year 2012[21] —another 40 years.

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[19]Md. Code Article 27, § 688 (1957 ed.); Article 27, §700 (1957 ed., 1966 Supp.); Article 27, § 700 (1971 ed.).

[20]See note 18, *supra.*

[21]N.Y. Times Encyclopedic Almanac (1972), at 304 (life expectancy of nonwhite male now age 25 is 40 years).

To prevent just such an abuse of statutes designed for the commitment of predicted offenders (such as "defective delinquents" or "sex offenders"), this Court has surrounded indeterminate confinement procedures, whether denominated civil or criminal, with constitutional guarantees of due process and equal protection. *Specht v. Patterson*, 386 U.S. 605 (1967); *Baxstrom v. Herold*, 383 U.S. 107 (1966). In *Specht*, the defendant had been convicted of a sex offense in violation of state criminal law. A separate statute authorized indeterminate confinement if the trial court found that a person convicted of specified sex offenses "constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." Although the latter statute required submission to the trial judge of a psychiatric report stating whether the convicted defendant could be treated under the statute or could be adequately supervised on probation, this Court held that the State's failure to hold a hearing prior to commitment as a "sex offender" at which the defendant had an opportunity to challenge the report and his possible confinement—by appearing with counsel, confronting witnesses against him, and presenting evidence of his own—violated the Due Process Clause of the Fourteenth Amendment. The Maryland "defective delinquency" law, like the sex offender act in *Specht*, is triggered by a criminal conviction and requires a "new finding of fact * * * that was not an ingredient of the offense charged", 386 U.S. at 609; the invocation of the defective delinquency law thus raises a "distinct issue" on which the defendant "must receive reasonable notice and an opportunity to be heard." *Id.* at 610.

The Court in *Specht* quoted with approval (386 U.S. at 609-610) the Third Circuit's ruling that "partial or niggardly procedural protections" cannot satisfy due process guarantees where the State's reluctance to provide a "full judicial hearing" before invocation of a "sex offender" statute (again like the Maryland defective delinquency law) could result in unjustified confinement for life. *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302

(3d Cir. 1966). The Third Circuit held in *Gerchman* that the trial court could not apply the post-conviction statute solely on the basis of a report from the State's mental health agency, without conducting a full hearing, even though after his commitment the defendant would receive "advanced, modern methods of cure and rehabilitation" and the institution would determine every six months whether he should be released. 355 F.2d at 310. The trial court had made "a new factual finding [that the defendant would constitute a danger to society if not confined] which went substantially beyond the finding of guilt of assault and battery with intent to ravish," 355 F.2d at 311; the defendant's potential life confinement exceeded the term of imprisonment he would otherwise have served (five years at most); and the failure to give him a full hearing, including the opportunity to confront and cross-examine witnesses, therefore violated due process guarantees. 355 F.2d at 313.

More recently, in *Humphrey v. Cady*, 40 U.S.L. Week 4324 (U.S. March 22, 1972), this Court noted that the Wisconsin sex crimes statute under review appeared to condition indefinite commitment to a "sex deviate facility" (in lieu of criminal sentence) "not solely on the medical judgment that the defendant is mentally ill and treatable, but also on the social and legal judgment that his potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty." Where such a determination must be made, a hearing before a jury "serves the critical function of introducing into the process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment". 40 U.S.L. Week at 4325 (footnotes omitted).

Thus even if the trial judge in the instant case had received a report concluding that McNeil should be classified as a "defective delinquent," and even if the statute had authorized the court to act on that report without a full

hearing on McNeil's status, the *Specht*, *Humphrey*, and *Gerchman* decisions would clearly invalidate his continued confinement.[22] In fact, however, no report finding McNeil to be a "defective delinquent" has ever been filed.[23] His continued confinement, lasting beyond the expiration of his criminal sentence, derives solely from his "referral" to Patuxent in 1966 "for observation, examination and evaluation for the purpose of determining whether or not" he should be classified as a defective delinquent. The printed referral order form used by the trial court (note 5, *supra*) contains only the unsubstantiated conclusion that the court has "reasonable cause to believe that the Defendant may be a Defective Delinquent * * *." No man can be indefinitely confined without a hearing on the assertion that there is reasonable cause to believe that he may have committed a crime; even less can a man be indefinitely confined without a hearing on the assertion that there is reasonable cause to believe that he may evidence "a propensity toward criminal activity * * *."[24]

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[22] *See also Miller v. Blalock*, 411 F.2d 548 (4th Cir. 1969) (State's interest in protecting its citizens from mentally ill persons with violent tendencies does not justify commitment without hearing); *Heryford v. Parker*, 396 F.2d 393, 397 (10th Cir. 1968) (civil commitment of child as "feeble-minded" without according due process hearing may "work shameful injustice"); *Huebner v. State*, 33 Wisc.2d 505, 147 N.W.2d 646 (1967) (due process requires hearing on sex offender's mental condition and need for treatment before confinement). In *Anderson v. Solomon*, 315 F. Supp. 1192, 1195 (D. Md. 1970), the court relied on *Heryford v. Parker*, *supra*, and *Specht v. Patterson*, *supra*, in concluding that Maryland's involuntary civil commitment statute (Article 59) raises "a number of serious constitutional issues," inasmuch as the law permits indefinite confinement on the certificate of two physicians, without prior hearing or mandatory subsequent hearing. The issue of the statute's constitutionality was held in abeyance pending determination of other issues.

[23] The only medical report ever filed concerning McNeil was the one submitted to the trial court prior to McNeil's referral to Patuxent, and this report merely suggested a diagnosis and recommended that he be "considered for evaluation and treatment" at Patuxent.

[24] *See* Md. Code, Art. 31B, §5, defining "defective delinquent."

As a matter of fact, even the trial court's initial, ex parte referral of McNeil to Patuxent violated due process, regardless of what transpired thereafter. In *Kent v. United States*, 383 U.S. 541 (1966), this Court held that a juvenile court—functioning as *parens patriae* to determine the needs of both the accused and society, not to adjudicate criminal conduct—could not waive jurisdiction without a hearing, even though it had received a psychiatric report on the defendant and recited in its waiver order that it had conducted a "full investigation." Since waiver constitutes a "critically important" action determining important statutory rights, drastically increasing the accused's possible confinement, the statutory provisions authorizing waiver, as "read in the context of constitutional principles relating to due process * * *", entitled the accused to a full hearing. *Id.* at 557. See also *Humphrey v. Cady, supra.* The referral to Patuxent constituted an equally important judicial decision, setting in motion a statutory procedure authorizing indefinite commitment, and appears equally defective under the Due Process Clause.[25] The fact that McNeil did not raise an insanity defense at trial makes the lack of hearing on the initial referral an even more significant denial of due process. And since McNeil's continued confinement derives from his initial referral to Patuxent in 1966, constitutional defects in that "proceeding" underscore the flagrant due process violation involved in his indeterminate confinement without treatment.

However, whether or not the initial referral can be viewed as valid, the fact remains that McNeil continues to be confined without any hearing whatever and without any

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[25]The fact that the statute calls for a later hearing on the ultimate issue (here, status as a "defective delinquent"), affording the defendant somewhat greater protection, does not insulate the triggering decision from constitutional scrutiny. *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970). Although the issue need not be faced in this case, McNeil does support the constitutional challenges to the defective delinquency hearing made in Brief for Petitioners at 22-38, 73-76 and Brief for Amicus Curiae at 57-74, *Murel v. Baltimore City Criminal Court, supra.*

hope of one. It is no answer to say that he refuses to "cooperate." Regardless of his reasons, McNeil has never—by implication or otherwise—waived his right to a judicial hearing on his confinement. If a refusal to cooperate with authorities were grounds for denying a hearing, anyone who declined to answer questions posed by an arresting officer could be imprisoned without a court determination of guilt.

Courts have particularly insisted on due process guarantees where state law authorizes civil commitment without hearing after a defendant has served his criminal sentence. For example, in *Dixon v. Attorney General*, 325 F. Supp. 966 (M.D. Pa. 1971), the District Court relied on *Specht v. Patterson, supra*, to hold unconstitutional on its face a statute authorizing the commitment to a state hospital of a prisoner once his sentence has expired, based solely on certificates of mental disability from two hospital staff physicians. Rejecting the argument that due process protections can be swept away because the proceedings are "intended to help and rehabilitate," the court rested the burden on the State to produce "reliable" evidence which "clearly, unequivocally and convincingly" establishes that hospital confinement is required. 325 F. Supp. at 974. See also *People v. Breese*, 34 Ill.2d 61, 213 N.E.2d 500 (1966); *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 215 N.Y.S.2d 44, 174 N.E.2d 725 (Ct. App. 1961).[26]

During the oral argument of the *Murel* case (No. 70-5276), Chief Justice Burger and Mr. Justice Blackmun inquired as to whether there was a federal procedure comparable to that employed by Maryland. The federal procedure is indeed instructive. By statute in force since 1949, a judicial hearing must be granted before a federal prisoner whose sentence is about to expire can be committed as insane or mentally incompetent and dangerous to the community. 18 U.S.C. §4247. The commitment procedure is initiated by a certi-

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[26] By contrast to Maryland law, the Connecticut statute recognizes termination of criminal sentence as requiring a court hearing if the state seeks continued confinement of a person believed mentally ill. Conn. Gen. Stat. Ann. §§ 17-197, 17-245, 17-246.

ficate as to the specified conditions from the Director of the Bureau of Prisons and by a report from the particular prison's board of examiners. 18 U.S.C. §4241. The District Court having jurisdiction over the prisoner's place of confinement then designates two psychiatrists, one chosen by the court and one by the prisoner, to examine him. At the hearing, the psychiatrists submit their reports, and other pertinent records relating to the prisoner's mental condition are considered. All persons who have examined the prisoner are subject to cross-examination by him, and the court may summon other witnesses for the prisoner. Only after holding a full hearing and after finding that the specified conditions exist can the court commit the prisoner to the custody of the Attorney General for further confinement once his sentence expires. The House Report on the legislation adding 18 U.S.C. § 4247 points out that an initial version of the bill was amended to insure the prisoner a full hearing "before his liberty is further restrained," by making it mandatory (rather than discretionary) for the court to provide for an examination by a qualified psychiatrist chosen by the prisoner and for the summoning of additional witnesses on his behalf. These amendments to the initial bill were termed "essential for the protection of the prisoner." H.R. Rep. 1319, 81st Cong., 1st Sess. (1949).[27]

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[27] A similar judicial hearing must be held after issuance of a certificate that a person charged with a federal offense may not be competent to stand trial, or that a person imprisoned on a federal conviction may have been mentally incompetent at trial. 18 U.S.C. §§ 4244-4246. On its face, 18 U.S.C. §4241 authorizes the Attorney General to transfer mentally ill federal prisoners to hospital facilities after examination by the prison's board of examiners, but without hearing, *said hospital confinement not to continue beyond the prisoner's maximum sentence.* However, the District of Columbia Circuit has held that constitutional guarantees require a full judicial hearing before transfer to St. Elizabeths Hospital of mentally ill prisoners under a D.C. statute (24 D.C. Code § 302) similar to the federal prisoner transfer statute (18 U.S.C. §4241). *Matthews v. Hardy*, 420 F.2d 607 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970). While resting its decision on equal protection considerations, the court stated that failure to grant a full hearing (even though not

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Although the Maryland statute requires Patuxent to file with the referring court within a specified period of time (note 7, *supra*) a report stating its findings as to whether the defendant should be classified after hearing as a "defective delinquent" (Article 31B, § 7(a)), the State asserts that the report cannot and need not be prepared unless the defendant submits to its psychiatric examination, and that no defective delinquency hearing will be held until a report is filed. In short, the State asserts that it can confine the inmate not only beyond the statutory period for the report but until he cooperates or dies, whichever first occurs, in an institution designed for the segregation and treatment of "defective delinquents," even though the referred defendant has not been classified as a defective delinquent and even though Patuxent denies him the treatment furnished to those who have been so classified.[28] The State's position

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called for by the statute) would raise a "substantial" due process issue. 420 F.2d at 612 n. 14.

Likewise, a full judicial hearing must be held as to a narcotic addict's eligibility for treatment under the Narcotic Addict Rehabilitation Act of 1966, although not expressly required by the statute. 18 U.S.C., § 4253. In *United States v. Carroll*, 436 F.2d 272 (D.C. Cir. 1970), the court ruled that the Act "is in essence a classification statute in which an adverse determination that a person is a member of a class has an immediate effect upon his personal liberty. As a member of the class of eligible offender addicts, individuals may be committed to a program in which the maximum term of confinement is determined more with respect to status within the class (*e.g.*, their progress as patients) than with reference to the gravity of the offense which brings them initially within the ambit of the statute. Since personal liberty is vitally affected, the Fifth Amendment requires that due process of law be applied to the classification process. And notice of the facts supporting the contemplated classification, along with an opportunity to test or reply to these facts, is beyond doubt an important part of this due process requirement * * *." 436 F.2d at 273-274.

[28] A defendant who arrives at Patuxent for evaluation is placed on the recieving tier—one of seven levels of cells used by the institution. Murel J.A. Md., at 849. Normally, an inmate is promoted from tier to tier through cooperation, progress, rehabilitation, etc. No one leaves the

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cannot be sustained under the decisions cited herein making due process guarantees a condition precedent to indefinite commitment. But in addition, the State's position rests on an inaccurate factual assumption—namely, that the defendant's answers to officials' questions are an absolute prerequisite to a report on defective delinquency.

Two different circuit court judges in Maryland have recently conducted evidentiary hearings at which Patuxent staff members testified that the institution could not file the required evaluation report absent a personal interview, and at which other physicians specializing in psychiatry testified that an opinion as to defective delinquency can be based on data available in the inmate's file at Patuxent.

(i) In the earlier case, *McKenzie v. Director*, Law No. 39033 (Circuit Court for Prince George's County, unreported opinion and order filed July 7, 1970), Dr. Harold M. Boslow, Director of Patuxent, stated that he could not make an evaluation of defective delinquency if the inmate refused to speak because it would be "slipshod" and "unprofessional." On the other hand, Dr. Brian Crowley, a psychiatrist formerly on the staff of St. Elizabeths

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receiving tier, however, until a report on him has been filed with the court and he has been formally committed, so that McNeil has remained on the receiving tier for almost six years. Inmates on this tier are not allowed to receive either personal or group therapy and in fact must remain in their individual cells all day except for two hours in a small exercise yard. Murel J.A. Md., at 414, 429-430, 616-617, 628; Murel J.A. 4, at 70, 73, 181, 206, 223. This occurs despite the facts that psychiatrists believe diagnostic and treatment procedures should go hand-in-hand and contemporaneously (Murel J.A. Md., at 112-113), and that treatment has repeatedly been described as one of the primary objectives at Patuxent. Murel J.A. Md., at 215, 305, 392, 556, 671; Murel J.A. 4, at 292-293; Boslow and Manne, "Mental Health In Action—Treating Adult Offenders at Patuxent Institution," Crime and Delinquency (January 1966); Boslow, Rosenthal, Kandel and Manne, "Methods and Experiences in Group Treatment of Defective Delinquents in Maryland," 7 J. Soc. Therapy (1961); Manne, "A Communication Theory of Sociopathic Personality," XXI Amer. J. of Psychotherapy (1967).

Hospital,[29] testified that the file material on McKenzie justified "a medical opinion to a reasonable medical certainty * * *." Weighing the conflicting testimony, Judge William B. Bowie concluded "that there can be a proper evaluation of defective delinquency even though an individual refuses to submit to the complete examination given at Patuxent." The court also cited the earlier testimony of Dr. Manfred S. Guttmacher, Chief Medical Officer of the Supreme Bench in Baltimore, in *Director v. Daniels, supra,* that diagnosis of a referred inmate who "remains completely silent" would require "a long period of surveillance * * *." Murel J.A. Md., at 258. The circuit court said that the time spent by McKenzie at Patuxent without evaluation—more than five years, extending beyond his criminal sentence—provided that institution with a "long period" of observation and ordered Patuxent to submit the statutory report within 30 days.[30]

By letter to the court dated July 28, 1970, Dr. Boslow stated:

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[29]Dr. Crowley, who practices psychiatry at the Potomac Foundation for Mental Health, Bethesda, Maryland, is an assistant clinical professor of psychiatry at the George Washington University School of Medicine. He has lectured at Catholic University Law School and served as consultant to the Montgomery County Health Department.

[30]Patuxent officials repeatedly emphasized in *Murel* the extraordinary amount of information available to them other than that obtained from incriminating answers to questions posed to the inmate. This information comes from interviews with the inmate's family, relatives, friends and employers; reports and records from the police and F.B.I., courts (including juvenile), institutions, hospitals (including psychiatric), schools, probation departments, and the medical office of the Supreme Bench; tests such as the Wechsler-Bellevue Intelligence Test, the Rorschach Ink Blot Test, the Draw-A-Person Test, Encephalographic brain tests, and Pneuencephelogram (air brain) studies; and impressions gleaned from personal surveillance of the inmate while at Patuxent. *E.g.*, Murel J.A. Md., at 111-112, 172, 173, 181, 233, 258, 277, 279, 282, 533-539, 621-624, 661, 664; Murel J.A. 4, at 205, 209, 212-213, 225, 232, 540-541.

> It is the opinion of the staff of this Institution that Lawrence Harper McKenzie is a Defective Delinquent * * *.

The accompanying report filed with the court notes that McKenzie had refused to be examined on 16 occasions during his confinement at Patuxent. Nonetheless, the report presents three single-spaced pages of information about McKenzie,[31] drawn from F.B.I. and police records, military records, a "social history questionnaire" completed by McKenzie's sister, certain comments he made to a "classification officer" and psychologist (apparently at Patuxent) some six years prior to the report, yearly physical examinations at Patuxent, an interview with an administrative official at his high school, and observation of his behavior at Patuxent for more than five years.[32] The report—signed by Dr. Boslow, a psychiatrist, a psychologist, and a medical physician—concluded that McKenzie "is, on the basis of history alone, a clear and present sexual danger to children in the community" and recommended his commitment (after the statutory hearing) as a defective delinquent.[33] A

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[31] Dr. Boslow, Director of Patuxent, testified in *McKenzie* that the amount of the institution's data on McKenzie was "about average" in comparison with the data on others referred for evaluation. Tr. of Proceedings before Judge Bowie, Circuit Court for Prince George's County, Maryland, May 1, 1970, at 78.

[32] The report states as to McKenzie's behavior at Patuxent: "This patient's activity during six years in Patuxent Institution has, for the most part, consisted of an attempt on his part to redress so-called 'grievances,' including a suit against the mail censor at the Institution, indignation at the attempt of the Institution to identify visitors to the Institution, concern about the price of goods sold in the Institution commissary, and of course, attempts on his part to obtain his release from the Institution. Of particular note, in light of his past history, is a disciplinary infraction received early in his incarceration here for manually masturbating another patient during the course of a Protestant church service."

[33] The concluding paragraph of the report reads: "This patient has never been examined by the Institution Diagnostic Staff. While on the

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court hearing as to whether McKenzie is in fact a defective delinquent has not yet been held.

(ii) Dr. Harvey Kelman, the Patuxent staff psychiatrist who signed the July 28, 1970, evaluation report on McKenzie despite McKenzie's refusals to submit to a diagnostic examination, testified in the later circuit court case that a personal interview is "indispensable" to such an evaluation. *Davis v. Director,* Misc. Pet. # 4410 (Circuit Court for Montgomery County, Maryland, unreported opinion and order dated December 11, 1971). Judge Plummer M. Shearin, after consideration of the testimony by Dr. Kelman, Dr. Crowley, and another psychiatrist and of the relevant statutory provisions, held that the failure to diagnose Davis despite his four-year confinement at Patuxent (during which his criminal sentence had expired) required his immediate release.

Judge Shearin found that "direct verbal communication between inmate and psychiatrist, although desirable, is not indispensable" to making the report required by statute,[34]

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basis of the information available to us he might seem to satisfy the criterion of Defective Delinquency by virtue of his repeated antisocial activity and obvious danger to children, as well as the possibility of some inferred emotional unbalance, such a conclusion would be open the revision by the provision of some modicum of information from the patient. Since the Court has ordered an 'examination' and recommendation in regard to this patient, the only recommendation that can be made here is that he be committed to this Institution as a Defective Delinquent since he is, on the basis of history alone, a clear and present sexual danger to children in the community."

[34] See, *e.g.*, Kolb, *Noyes' Modern Clinical Psychiatry* (7th Ed. 1968), at 158-159, listing some 50 diagnostic questions which can be answered by observing "inaccessible" patients who are unwilling or unable to speak or otherwise cooperate in a mental examination; Cheney, ed., *Outlines for Psychiatric Examinations* (2d. Rev. Ed. 1940), at 86-88, enumerating valuable observations which can be made in the examination of "uncooperative" patients; Cammer, *Outline of Psychiatry* (1962), at 309 (psychodiagnostic examination may or may not include a personal interview).

and that Patuxent had "failed to make reasonably diligent efforts" to evaluate Davis despite the availability of data in the institution's files.[35] The court concluded that Patuxent "has displayed such marked indifference to its plain duty in the premises as to amount to a deprivation of Davis' liberty without that due process of law commanded by the Fourteenth Amendment to the Federal Constitution. The State cannot escape the consequences of such impermissible inaction by one of its instrumentalities."[36]

Thus, it is factually inaccurate for the State to assume in all cases and without further explication that an inmate such as McNeil must be personally interrogated before he can be diagnosed. Under such a blanket assumption, non-compliance on McNeil's part can be converted into a simple ploy on behalf of the State to keep him confined. By asserting that his help is essential and that no report can be made without it, the State avoids judicial interference indefinitely and maintains incarceration as if McNeil had

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[35] The data as to Davis included his criminal record; juvenile court, school, and social worker reports; physical examinations; psychological and psychiatric reports made prior to his confinement at Patuxent; and a personal interview of Davis by Dr. Kelman soon after his confinement.

[36] In *Davis*, the Court of Special Appeals denied the State's petition for writ of certiorari by unreported opinion dated January 8, 1972 (Misc. No. 23, September Term, 1971). While stating that the order "was entered in apparent disregard" of *State v. Musgrove*, 241 Md. 521, 217 A.2d 247 (1966), the appellate court pointed out that it had no statutory jurisdiction to review the lower court's habeas corpus order. Ironically, the statement in *Musgrove* that a personal interview would "usually" be needed for the staff's evaluative report (217A.2d at 251) is also dictum, since the appeal there sought was likewise from a habeas corpus order releasing an inmate after expiration of his criminal sentence, and the institution had relied on the inmate's non-cooperation as an excuse for not timely filing the report required by statute. 217 A.2d at 248-249. The appellate court in *Musgrove* did not expressly address itself to the due process issue raised here.

been adjudged a defective delinquent after a full hearing with evidence, witnesses, confrontation, cross-examination, a jury finding, and all the rest.

Patuxent has simply abandoned McNeil to time, depriving him of any opportunity to return to a productive life in society and squandering the State's resources on his continued confinement. This enforced isolation from the outside world is dramatically illustrated by the ex parte letter (note 14, *supra*) sent by Patuxent to the committing court and to the prosecutor but *not* to the inmate or his attorney.[37] The letter, far from soliciting a court hearing to determine McNeil's status or the legality of his position, merely informed the court of his refusal to be examined and the alleged inability of the institution to come forth with the required report. The letter stated that the court would be further advised if there was any change in McNeil's position. The court did not bother to answer the letter, and of course McNeil was unaware of it.[38]

(b) Other Constitutional Violations.

The State's refusal to do anything—to make an evaluative report, to hold a judicial hearing as to McNeil's status, or to offer him rehabilitative treatment—has been deliberate,

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[37] It is no excuse that a copy of the letter was placed in McNeil's Patuxent file. In the first place, unless an inmate's attorney happens to be reviewing the file, presumably on some other business, he will never even come across the letter. Secondly, in McNeil's case he has been without an attorney during part of his incarceration, as evidenced by his pro se Petition to this Court.

[38] This was not an isolated incident. In the case of Bradley Avey, one of the Petitioners in *Murel*, the institution wrote a similar letter to the trial court, again with copies to the prosecutor but not to the defense. The only difference was that the court wrote back, saying that it assumed Patuxent would "retain Mr. Avey * * * until he changes his mind in the matter". Murel J.A.4, at 284-285. Parenthetically, Patuxent not only read but made copies of or notes from letters between Avey and his attorney. Murel J.A.4, at 68-69.

not accidental. More than a shocking denial of due process is involved here.

(i) *Equal Protection.*

Patuxent's issuance of an evaluative report on at least one inmate (McKenzie) despite a lack of a personal interview while it refuses to file an evaluative report on McNeil constitutes a gross and cynical violation of equal protection. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). It is both an ironic and a depressing fact that if McNeil had been confined at the Correctional Institution at Hagerstown, to which he was originally ordered for service of his sentence, and he had actually completed his full sentence at that institution, he would have received five years of "courses of academic education from the elementary through high school grades, diversified vocational and on-the-job training activities, individual and group psychotherapy, counselling and guidance." 48 Opin. Atty. Gen. Md. 82, 88 (1963). Yet because he has pleaded the Fifth Amendment, he has received *no* activities, therapy, counselling, or guidance for any of the almost six years he has spent at Patuxent. Even if he is not constitutionally entitled to be treated the same as inmates of the State's prisons, he is certainly entitled to the same evaluative reporting procedure accorded other inmates of Patuxent.

(ii) *Speedy Trial.*

The State's continuing delay of more than six years in holding a judicial hearing as to McNeil's possible defective delinquency also violates the speedy trial guarantee of the Sixth and Fourteenth Amendments. For example, in *Klopfer v. North Carolina,* 386 U.S. 213 (1967), the Court held that indefinite delay in prosecution of a criminal action—where the State had taken "nolle prosequi with leave," discharging the accused from custody but leaving him subject to future prosecution—violated speedy trial

rights under these Amendments. Mr. Justice Harlan, concurring, said that the "traditional concepts of due process" set forth in the Court's opinion also sustained the holding that the accused was entitled to a hearing on the charges against him, whether or not the State wanted to provide it. 386 U.S. at 227. In *People ex rel. Myers v. Briggs*, 46 Ill.2d 281, 263 N.E.2d 109 (1970), an illiterate deaf-mute (Lang) indicted for murder had been confined to a mental institution after a jury had found him incompetent to stand trial. While confined, Lang "refused to participate and cooperate" with instructors at the institution who sought to teach him sign language and other communication skills. The Supreme Court of Illinois held that Lang was entitled to "a reasonable opportunity to obtain the benefit of his constitutional rights" in the face of indefinite commitment, and ordered the state either to hold a hearing on the criminal charges or to release him. 263 N.E.2d at 113.

(iii) Cruel and Unusual Punishment.

The State has imposed indefinite confinement on McNeil as punishment for his refusal to submit to its psychiatric examination and has denied him rehabilitative treatment, all in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. McNeil's continued confinement violates this ban in three respects. First, indefinite confinement for refusal to cooperate with the institution's examination constitutes a prohibited punishment. *Wright v. McMann*, 321 F. Supp. 127, 145-146 (N.D.N.Y. 1970) (solitary for 1½ years for refusal to sign acknowledgment of institution's safety rules). Second, indefinite confinement without affording treatment also violates that constitutional provision. See *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971) (persons involuntarily committed without the due process protections afforded defendants in criminal proceedings "unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her

mental condition"); *United States ex rel. Schuster v. Herold*, 410 F.2d 1071, 1079 (2d Cir.), *cert. denied*, 396 U.S. 847 (1969) (prolonged custodial commitment may itself "cause serious psychological harm or exacerbate any pre-existing condition"); *Rouse v. Cameron*, 373 F.2d 451, 453 (D.C. Cir. 1966). Third, confinement solely on the basis of a criminal conviction to an institution housing persons found to be defective delinquents, without a judicial finding that McNeil belongs to the same class, likewise violates the ban. *People ex rel. Cirrone v. Hoffmann*, 255 App. Div. 404, 8 N.Y.S.2d 83, 86 (S.Ct. 1938); see also *United States ex rel. Schuster v. Herold, supra*, 410 F.2d at 1078-1079 ("obvious but terrifying possibility" that inmate may not be mentally ill but is confined, "marooned and forsaken," with persons found to be so).

(iv) *Involuntary Servitude.*

Finally, imprisonment of McNeil at Patuxent beyond the expiration of his criminal sentence violates the Thirteenth Amendment's prohibition against involuntary servitude. *Cf. Wright v. Matthews*, 209 Va. 246, 163 S.E.2d 158 (1968) (prisoner's continued detention after his criminal sentence had expired on the grounds that he had not paid the state for the costs of his criminal prosecution violated the Thirteenth Amendment). See also *United States ex rel. Caminito v. Murphy*, 222 F.2d 698 (2d Cir.), *cert. denied*, 350 U.S. 896 (1955) (continued detention in jail after conviction of a crime at a trial at which the prisoner had been denied due process of law under the Fourteenth Amendment violates the Thirteenth Amendment).

It is time to stop this tragic deprivation of an entire series of McNeil's constitutional rights.

II. THE PRIVILEGE AGAINST SELF-INCRIMINATION FORBIDS CONFINING McNEIL INDEFINITELY AT PATUXENT, AS THE PRICE FOR REFUSING TO SUBMIT TO THE INSTITUTION'S PSYCHIATRIC TESTS.

As we have seen, McNeil's reason for refusing to "cooperate" with the commitment process at Patuxent is irrelevant to his right to a hearing. No matter what his reason, he cannot be permanently interred, which is essentially what has happened, without a judicial hearing. In this instance, however, McNeil has had very good reason indeed for declining to "cooperate," which is a euphemism for refusing to incriminate himself at the behest of the officials at Patuxent.

The Fifth Amendment privilege against self-incrimination, applicable to the states through the Due Process Clause of the Fourteenth Amendment, insures the right of a person "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty * * * for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). In *Malloy*, the petitioner had been arrested during a gambling raid by Hartford, Connecticut, police. He pled guilty to "pool selling," a misdemeanor, and was placed on two years' probation after serving 90 days of a one-year jail sentence. During the probation period, Malloy was ordered to testify as a witness before a court-appointed referee who was conducting a wide-ranging statutory inquiry into alleged gambling and other criminal activities in Hartford County. When Malloy appeared before the referee, he refused to answer "a number of questions related to events surrounding his arrest and conviction". 378 U.S. at 3. The penalty imposed for this silence was indefinite imprisonment for contempt of court until Malloy was willing to answer the questions. This Court reversed the decision of the state court which had sustained the penalty, applied the federal standards developed under the Fifth

Amendment, and held that imposition of such a penalty on Malloy (even though he was not a defendant in a criminal prosecution) violated his privilege against self-incrimination.[39]

The privilege outlaws "any compulsory discovery" as "contrary to the principles of a free government" (*Boyd v. United States*, 116 U.S. 616, 631-632 (1886)), wherever it is "evident from the implications of the question, in the setting in which it is asked, that a responsive answer * * * or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Hoffman v. United States*, 341 U.S. 479, 486-487 (1951). In cases decided since *Malloy*, this Court has consistently struck down sanctions imposed by state authorities in a variety of settings for refusals to answer questions where the person "has reasonable cause to apprehend danger from a direct answer."[40] *E.g.*, *Spevack v. Klein*, 385 U.S. 511 (1967) (attorney cannot be disbarred because he relied on the privilege during disciplinary proceeding); *Gardner v. Broderick*, 392 U.S. 273 (1968) (policeman cannot be fired for invoking the privilege as grounds for refusing to sign a waiver of immunity at grand jury hearings into alleged bribery and corruption); *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280 (1968) (sanita-

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[39] In their joint dissent from the Court's opinion, Justices White and Stewart expressed their preference for "the rule permitting the judge rather than the witness to determine when an answer sought is incriminating". 378 U.S. at 33. Under either the Court's or the dissent's view of the privilege in *Malloy*, McNeil's continued confinement violates his privilege against self-incrimination because there has never been a prior judicial determination as to whether requiring him to answer the specific questions sought to be posed by the State would or would not violate the privilege.

[40] *Hoffman v. United States, supra*, 341 U.S. at 486.

tion workers may not be discharged for invoking the privilege before the city commissioner of investigation).[41]

For the reasons set forth below, we contend that this Court's decisions in *Malloy v. Hogan* and the other cases cited above establish that McNeil's privilege against self-incrimination was impermissibly infringed.

(a) The Questions Asked By The State Focus on the Inmate's Criminal Behavior.

The incriminating nature of the questioning which the State seeks to undertake becomes quickly apparent when that questioning is placed in the context of what has actually occurred to date and what will occur if the questioning is allowed to proceed.

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[41] In *Garrity v. New Jersey*, 385 U.S. 493 (1967), decided the same day as *Spevack*, police officers had testified in an investigation by the state Attorney General into the fixing of traffic tickets, after the officers had been told that they would be fired if they refused to testify. The state subsequently sought to use some of this testimony in criminal prosecutions of the policemen. This Court held that the Fifth Amendment barred the introduction of such testimony.

In a dissent, Justices Clark, Harlan and Stewart stated: "The central issues here are * * * identical to those presented in *Spevack* * * *: whether consequences may properly be permitted to result to a claimant after his invocation of the constitutional privilege, and if so, whether the consequence in question is permissible. * * * [N]othing in the logic or purposes of the privilege demands that all consequences which may result from a witness' silence be forbidden merely because that silence is privileged. The validity of a consequence depends both upon the hazards, if any, it presents to the integrity of the privilege and upon the urgency of the public interests it is designed to protect." 385 U.S. at 500, 507. Even under this view of the privilege, there could be no greater hazard to its integrity than the confinement of McNeil without a judicial hearing for an indefinite period, possibly life, because he has remained silent. We further submit that there is no urgent public interest, indeed no public interest whatever in confining McNeil indefinitely beyond the expiration of his criminal sentence in the absence of any finding by any court that McNeil should be classified as a "defective delinquent."

To begin with, the defendant does not even become subject to diagnosis—and thus questioning—unless there is reasonable cause to believe that he has already demonstrated both "persistent aggravated anti-social or criminal behavior" and "a propensity toward criminal activity." Article 31B, §5; see Murel J.A. Md. at 166, 259, 348.[42] He must also have been convicted of and sentenced for at least one specific crime. Article 31B, §6(a). We begin, then, with the one person out of the general population who is most likely to incriminate himself.

The nature of the questioning that is to follow is sharply etched, though in capsule form, by the preliminary interview conducted by the Medical Department to determine whether the defendant should even be referred to Patuxent for diagnosis. In McNeil's case, the report that resulted from this interview showed repeated, insistent interrogation about not only the crime for which he had been convicted, but all other anti-social incidents, going back to the tenth grade, that the interrogator could find reflected in available records.[43] (McNeil vehemently denied complicity in all of

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[42] In this regard, however, it is noteworthy that the trial court conceded, at the time McNeil was referred to the Medical Department for a report: "* * * the Court records do not reflect a conviction on any previous charge * * *." J.A. 32.

[43] *E.g.*, "He adamantly and vehemently denies, despite the police reports, that he was involved in the offense;" "Further questioning revealed that he had stolen some shoes but he insisted that he did not know that they were stolen * * *;" "* * * in the tenth grade he was caught taking some milk and cookies from the cafeteria;" "He consistently denies his guilt in all these offenses;" "He insisted that he was not present at the purse snatching;" "He was adamant in insisting on this version of the offense despite the police report which was in the brief and which I had available and discussed with him;" "He continued his denial into a consideration of a juvenile offense * * *;" "He denies the use of all drugs and narcotics;" "* * * I explained to him that it might be of some help to him if we could understand why he did such a thing but this was to no avail." Report of John C. Sheehan, M.D., dated July 19, 1966, note 2, *supra*.

these incidents—so much so that even his denials were taken as a sign that "further offenses may occur.") To contend in the face of this type of questioning that it produces "physical evidence"[44] as opposed to testimonial self-incrimination would be ridiculous.[45]

Following the report of the court medical officer, the defendant is transferred to Patuxent where, after an initial interview with a classification officer,[46] a lapse of time is allowed for the collection of records, reports, etc. *See* note 30, *supra;* Murel J.A. 4 at 212; Murel J.A. Md. at 269-270, 669. This material, gathered in preparation for the forthcoming in-depth questioning of the inmate, includes all types of police reports, including those from the F.B.I., state and local police, the Armed Services, juvenile authorities and others. Note 30, *supra;* see example at Murel J.A. 4 at 540-541. When this gathering process has been completed, the defendant is brought forward for the group interview. "The law requires [that] at least three people be involved in the staffing [at the diagnostic interrogation], but it does not preclude the possibility of additional people being involved in the staffing procedure. We frequently, in fact always, have more than just the three people who do the examination." Murel J.A. 4 at 271. "[E]very member of the staff who is present at the staff meeting has the opportunity" to interrogate the defendant. *Id.* at 274. The

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[44] *Compare United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Schmerber v. California*, 384 U.S. 757 (1966).

[45] Moreover, the real point is not what the interrogator intends but what information he can be expected to elicit and what use will be made of that information by the State. *See* Note, *Requiring A Criminal Defendant To Submit To A Government Psychiatric Examination: An Invasion Of The Privilege Against Self-Incrimination*, 83 Harv. L. Rev. 648 (1970).

[46] The Classification Committee includes, in addition to a psychiatrist and psychologist, a social worker, a classification supervisor, an educational supervisor and a correctional officer. Murel J.A. Md. at 842-843.

staff includes social service workers and caseworkers in addition to psychiatrists and psychologists. Murel J.A. Md. at 172, 621-623, 661, 814-840; Murel J.A. 4 at 200-203.

The inmate is *not* warned of his constitutional rights —including his right to remain silent—unless he himself first brings up the subject. Murel J.A. 4 at 241, 243-244. Yet the record in *Murel* is replete with testimony that the questions asked by the staff inevitably focus on the convicted defendant's history of criminal behavior:

——Dr. Arthur Kandel, Chief Psychologist at Patuxent, told the court that "usually the question will be asked of the inmate what offense led to his coming to the institution. Both he and we, of course, are aware that we have written material in this regard, including the statements he may have made about his latest offense to the examining psychiatrist, psychologist, social worker, but he is asked this question again. * * * They [the staff] will ask about what past crimes they had committed * * *. * * * Frequently, they [the inmates] will talk about many crimes [which] appear [nowhere] in the records." Murel J.A. 4 at 203-204. Dr. Kandel was asked: "* * * [D]o you say [to the inmate], well, the F.B.I. reported it this way, do you now still want to stick to your story?," and he answered, "Yes." He explained that many times an inmate "will try to avoid giving his past background of offenses because he may feel that this would not be advantageous to him, and then he would be confronted with the F.B.I. report." *Id.* at 210. He quite candidly and explicitly noted that "there are a series of questions to elicit and to determine the past criminal record, antisocial and criminal behavior of the individual." *Id.* at 236.

——Dr. Manfred S. Guttmacher, Chief Medical Officer of the Supreme Bench in Baltimore, testified that a psychiatrist determines whether a person evidences a "propensity toward criminal activity" under Article 31B, §5, primarily by considering his past criminal behavior. Murel J.A. Md. at 173, 176-177, 181. He gave one example of an inmate who "admitted to me

that he had had sexual relations with at least 200 small boys" although he had only been convicted twice. *Id.* at 222.

—Dr. Philip Q. Roche, Chairman of an American Psychiatric Association Committee which made a report on Patuxent, testified that a psychiatrist seeking to determine whether a defendant had demonstrated "persistent aggravated anti-social" behavior under § 5 would find a "chronic repetitive pattern" of such behavior "very significant." *Id.* at 200. Dr. Karl A. Menninger, Director of the Menninger Foundation, testified that whether a person constituted an "actual danger to society" under § 5 could be established *only* by his past history of dangerous behavior. *Id.* at 282.

—Dr. Harold M. Boslow, Director of Patuxent, testified that the referral examination at Patuxent includes a discussion of the defendant's life history, and that if his answers to questions as to his past seem to conflict with other material in the record, the examiners resolve the conflict by "attempt[ing] to contact the proper authorities." *Id.* at 622-625. Among the items discussed are "his truancy, his anti-social behavior, his conflict with authorities, * * * all the details we can possibly get into." He is asked about his F.B.I. record, and "if he says it never happened, we attempt to investigate it further, you see." *Ibid.* He gave an example of an inmate accused of "accosting a young girl" and how the inmate "vigorous disputed it." *Id.* at 624.[47]

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[47] Even Judge Sobeloff, who thought in *Tippett v. Maryland*, *supra*, that the questioning was not *intended* to "entangle [the prisoner] in any criminal prosecution" (436 F.2d at 1161 n.6), conceded that:

> The statute directs the staff to make inquiry into the crime for which the prisoner has been sentenced and the circumstances surrounding the crime. The interviews also focus on (Cont'd.)

It is clear from these and other portions of the record in *Murel* that the staff believes that it must personally question the inmate about his prior criminal conduct, and that what the staff finds in the files or records about that conduct is only a starting point for a series of questions seeking more details about recorded incidents of criminal behavior and new information about unrecorded incidents of such behavior.[48]

(b) Answering The State's Questions Can Incriminate The Inmate In Four Respects.

Responding to the questions the staff claims it must ask in order to make its diagnosis of "defective delinquency" can be self-incriminating in at least four different respects:

(i) Answers to questions concerning the crime the conviction of which immediately preceded referral to Patuxent can be self-incriminating if the direct appeal from the conviction proves successful, and a new trial on the same charges is held. The introduction at re-trial of evidence derived from statements made to the examiners[49] could

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other crimes and antisocial behavior in his past. There is no contention by the state that the disclosures are voluntary. * * * Admissions made concerning mental state and past criminal behavior provide significant evidence for the state to use at the judicial hearing on defective delinquency. [*Id.* at 1160-61; footnote deleted.]

[48] Moreover, as noted above, the statute itself requires that the Institution obtain not only a complete statement as to the crime for which the inmate was convicted but "the circumstances of such crime." Article 31B, Section 7(a). Although the inmate is questioned about his criminal conduct, he is not shown what the staff has in its possession relating to that conduct or its recommendation in regard to him. Murel J.A. 4; at 202-203, 211, 228, 238.

[49] The state prosecutors would not be limited to learning about such statements at a defective delinquency hearing at which the examining doctors testify (Article 31B, § 8). Partial disclosures of

(Cont'd.)

lead to conviction. In the present case, McNeil's defense at trial, based on his own testimony, was that he did not commit the offenses charged, and to require him to discuss the circumstances of the offenses while his appeal was pending would clearly violate the privilege against self-incrimination.

(ii) Answers to questions about the crime which triggered referral to Patuxent can be self-incriminating with respect to collateral challenges to the conviction. In this case, for example, McNeil's first petition for post-conviction relief claimed, *inter alia*, that his arrest had been made without probable cause. If at the hearing on this claim, the State introduced evidence about that conduct based on or derived from statements McNeil made to the staff at Patuxent, such a claim could also be vitiated. Various post-conviction proceedings have been pending during virtually all of the time McNeil has remained at Patuxent.

(iii) Answers to any questions about criminal or other anti-social behavior can be self-incriminating because they may reveal for the first time evidence of a crime or "a link in the chain of evidence"[50] of a crime about which state

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criminal or other anti-social conduct, which in the opinion of the Patuxent staff might be too fragmentary upon which to base an opinion one way or the other on the question of defective delinquency, would nevertheless be noted in the inmate's official file at Patuxent, and state prosecutorial authorities have access to this file. *Compare United States v. Freed*, 401 U.S. 601, 606 (1971), relied upon by the state at pages 86-87 of its brief in *Murel*, where this Court held that the privilege against self-incrimination was not violated because registration data compiled under the provisions of the National Firearms Act was not, as a matter of administration, made available to prosecutorial authorities. Here the self-incriminating statements *are* available to such authorities both from the testimony at the defective delinquency hearing *and* from the inmate's official file at Patuxent.

[50] In *Malloy v. Hogan*, *supra*, 378 U.S. at 13, the Court stated:

> It was apparent that petitioner might apprehend that if this person [about whom he was asked] were still engaged in

(Cont'd.)

authorities had no prior knowledge or insufficient knowledge to prosecute. In this regard, it is important to note that in Maryland, *there is no statute of limitations as to any crime for which the punishment is imprisonment.* This means that McNeil and every other inmate at Patuxent can still be punished for all but the most negligible crimes that they may have committed *at any time in their lives.*

With respect to each of these three dangers of self-incrimination, there is at present no "immunity" stemming from state law prohibiting prosecutorial authorities from using evidence obtained during the examination at Patuxent for further prosecution of the defendant. In his separate opinion in *Tippett v. Maryland, supra,* Judge Sobeloff said he would "insist" that "the prisoner is entitled to complete immunity in respect to matters he is compelled to disclose." 436 F.2d at 1161 n. 6. However, despite Judge Sobeloff's "insistence," there is no such immunity under state law now, and neither Judge Sobeloff nor the *Tippett* majority actually ruled that a Patuxent inmate is entitled to such immunity as a matter of federal constitutional law.

Compelling answers to all questions, but then granting the prisoner immunity from their use against him, would not be the appropriate remedy anyway. In *Murphy v. Waterfront Comm'n,* 378 U.S. 52 (1964), this Court approved the granting of immunity as a means of protecting the privilege in the context of an investigation by the Waterfront Commission of New York Harbor into a work stoppage at the Hoboken, New Jersey, piers so long as the "grant of immunity * * * is coextensive with the scope of the privilege against self-incrimination * * *." *Id.* at 54. This approach would be totally inappropriate in the case of the questions asked at the Patuxent psychiatric examinations because it simply would not provide sufficient

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unlawful activity, disclosure of his name might furnish a link in a chain of evidence sufficient to connect the petitioner with a more recent crime for which he might still be prosecuted. [Footnote deleted.]

safeguards to the Patuxent inmate. Even if he was granted immunity from the use of his answers at the defective delinquency judicial hearing as well as at prosecutions for other crimes (or re-prosecutions for the crime leading to referral), the testifying doctor could not be asked to "bifurcate his mind" and pretend that his expert opinion on the status of the subject as a defective delinquent was based solely on evidence other than the subject's immunized answers to the self-incriminating questions. In addition, as the court pointed out in *Shepard v. Bowe*, 250 Ore. 288, 442 P.2d 238 (1968), the dangers of misuse of the answers by prosecutorial authorities, even under immunity, are still too great:

> Even if we prohibited the psychiatrist from testifying to incriminating statements made to him by the defendant in a pre-trial mental examination, requiring the defendant to answer could nevertheless jeopardize the privilege against self-incrimination. The statements made by the defendant to the psychiatrist could provide a lead to other evidence which would incriminate the defendant on the issue of guilt. If the trial court ordered that statements made by the defendant to the psychiatrist could not be revealed to the state or to any other person except upon court order, we are of the opinion that under certain circumstances there is more than a remote chance that such statements would become known to others in addition to the trial court. [442 P.2d at 241.]

Forcing a prisoner to speak to a psychiatrist by granting immunity would also be self-defeating. As one psychiatrist—a former superintendent of state mental hospitals in both Maryland and Iowa—put it in the *Murel* case: "Well, ultimately, if there is going to be constructive change brought about, there must ultimately be a relationship of mutual trust and respect. * * *." Murel J.A. Md. at 67, 84; see also 85-87, 136, 138. It is hard to imagine a practice that would destroy mutual trust and respect more thoroughly than forcing a prisoner to talk to a psychiatrist

against his will and under threat of a contempt order. Since one of the purposes of incarceration at Patuxent is therapy designed to equip the prisoner for return to civilian life, the net effect of immunity would be to facilitate an initial evaluation but in the process to reduce drastically the hope of rehabilitation.

(iv) Moreover, even if such immunity were granted, it would have no effect whatever on the fourth respect in which statements made to the Patuxent staff may be self-incriminating: they may be used against the examined person in ordering him confined indefinitely—even beyond the period of the criminal sentence—as a defective delinquent. The reports of the staff at Patuxent are admissible in evidence at the judicial hearing on defective delinquency (*e.g., Schlatter v. Director,* 238 Md. 132, 207 A.2d 653 (1965)), even if the persons preparing the reports do not testify. *E.g., Mastromarino v. Director,* 243 Md. 704, 221 A.2d 910 (1966). Evidence of a person's past history of anti-social or criminal behavior is admissible at the hearing (*e.g., Sas v. Maryland,* 334 F.2d 506 (4th Cir. 1964); *Daniels v. Director,* 238 Md. 80, 206 A.2d 726 (1965)), and testimony can be given as to the nature of past offenses, not merely the fact of conviction. *Schultz v. Director,* 227 Md. 666, 668, 177 A.2d 848, 849 (1962). In *Simmons v. Director,* 227 Md. 661, 177 A.2d 409 (1962), the court held that a psychiatrist's testimony as to prior offenses and convictions of the inmate, which information was obtained by the psychiatrist's questioning of the inmate, was admissible.

There is no protection in Maryland against these various forms of self-incrimination. In 1966, the Maryland legislature passed a statute establishing, under certain specified circumstances, a privilege pursuant to which a patient may prevent a psychiatrist or a psychologist from disclosing "in civil and criminal cases" any communications made to him by the patient for purposes of diagnosis and treatment. Md. Code Ann., Art. 35, §13A. However, the statute expressly

excepts from the privilege disclosures made to such doctors in "all phases of any civil or criminal proceedings" under the defective delinquency statute. Article 35, §13A(c)(5). Although Article 35, §13A, would appear to prohibit Patuxent doctors from testifying with respect to disclosures made to them by a person referred to Patuxent in a subsequent criminal prosecution of that person, it is unclear under Maryland case law whether this is in fact the case. *See Avey v. State*, 9 Md. App. 227, 263 A.2d 609, 614 (1970) (since *defendant* failed to prove that the State's Attorney obtained evidence leading to conviction as a result of examining defendant's records at the Department of Mental Hygiene, court would not decide whether the privilege provided by Article 35, §13A, had been violated); see also Murel J.A. Md. at 252-253.

Moreover, even on its face the statute does not provide any privilege for disclosures made to any member of the staff *other than* a psychiatrist or psychologist—such as a social worker, caseworker or classification officer—about the details of crimes, nor does it prevent such disclosures to anyone—be it psychiatrist, psychologist, or anyone else—from being used by prosecutorial authorities as a "link in a chain of evidence" to convict a person for other crimes or to reprosecute him for the crime which triggered the referral to Patuxent.[51]

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[51] In a larger context, this Court should note in deciding this case that many states do not have statutes protecting communications between patients and psychiatrists or psychologists, and that others have statutes which are limited by numerous exceptions and qualifications. *See generally* 8 Wigmore, Evidence §§ 2380-2391 (McNaughton revision 1961). Accordingly, both in Maryland and in many other states, any "doctor-patient privilege" which may exist is not "coextensive with the scope of the privilege against self-incrimination." *Murphy v. Waterfront Comm'n, supra*, 378 U.S. at 54; *Counselman v. Hitchcock*, 142 U.S. 547 (1892). Thus, only the constitutional protection against self-incrimination provided by the Fifth Amendment is a sufficient safeguard to protect the person being questioned about his crimes by the Patuxent staff.

Despite the many dangers of self-incrimination inherent in the Patuxent examinations, the District Court in *Sas v. Maryland, supra,* rejected the argument that the Maryland defective delinquency statute abridged the "right to remain silent" on the ground that "no resort to punitive measures occurs when a person referred for examination refuses to answer questions or to submit to an examination." 295 F. Supp. at 410. This is, of course, preposterous, since the refusal to answer these incriminating questions does, in fact, result in the imposition of a series of severe sanctions:

(i) Regardless of how much information the staff has in its possession about the inmate, and no matter how many non-incriminatory tests he may have undergone (see Section I(a), *supra*), the staff refuses to diagnose him (Murel J.A. 4 at 223), with the result that he never receives a hearing and must remain indefinitely-incarcerated at Patuxent.

(ii) He also remains on the receiving tier indefinitely, which means that he receives no treatment. *Id.* at 281-282. We thus have a literal example of what one psychiatrist hypothesized as a "tragedy":

> What I think would be a tragic thing is to put people in a place where they are not getting enough help to maximize their potential, and put them in there for an indeterminate period. If that would occur, I think that would be a tragedy. [Murel J.A. Md. at 353.]

(iii) In the normal case, a defendant's criminal sentence is suspended after his commitment to Patuxent "and the defendant shall no longer be confined for any portion of said original sentence * * *." Art. 31B, §9(b). Since McNeil has never been committed, his sentence continued to run until it expired. Although the statute clearly contemplates that there will be court review prior to the expiration of a sentence,[52] none has taken—or will take—place, and McNeil

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[52] Article 31B, §7(a), requires the staff to submit its written diagnosis to the court at least "3 months before expiration of [the inmate's] sentence * * *."

simply remains confined indefinitely.[53] Nor is this unique to him. At the time of the Director's testimony in the *Daniels* case, 20% of the Patuxent inmates were serving beyond their expired sentences. Murel J.A. Md. at 645, 858. Even more dramatically, of the 135 inmates paroled from Patuxent from its opening in 1955 until September, 1965, 46% had served beyond their expired sentences. *Id.* at 892-895.[54]

In addition to its seriously mistaken conclusions about the imposition of punishment on those Patuxent inmates who, like McNeil, decline to answer incriminating questions by the staff, the District Court in *Sas* also held that the privilege against self-incrimination was not available at the Patuxent examinations because the purpose of the examinations was not to determine whether the defendant had committed a crime, but was to discover his "mental and emotional condition." 295 F. Supp. at 411. Even if this were true (which we do not concede), it is well settled that the consequences of self-incrimination, not the purpose of the questioner, determines whether the privilege is available.[55]

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[53] As the State told the Court in its opposition to McNeil's Petition for a Writ of Certiorari, "Judge Thomas further found that a person referred to Patuxent * * * for the purpose of determining whether or not he is a defective delinquent may be detained in Patuxent until the procedures for such determination have been completed regardless of whether or not the criminal sentence has expired." Brief in Opposition, p. 3.

[54] Still another sanction is that unless the inmate periodically returns to a staff member and personally informs him that the inmate still refuses to answer questions, the inmate is disciplined. Murel J.A. 4 at 121, 217-221, 244, 322-323.

[55] *See* note 45, *supra*. *See also State ex rel. North v. Kirtley*, 327 S.W.2d 166 (Mo. 1959) (construing the self-incrimination provision of the Missouri Constitution, which was substantially similar to that in the Fifth Amendment to apply even though the purpose of the questioning was to make the defendant civilly liable); *State v. District*

(Cont'd.)

Moreover, as applied to the Patuxent examination, the District Court's conclusion about purpose is inconsistent with decisions by the Fourth Circuit and the Maryland state courts.[56] These decisions indicate that one of the purposes of the defective delinquency provisions is protection of society from those who are disposed to commit crimes. Indeed, *The Report Of Commission To Study and Re-Evaluate Patuxent Institution* 11 (1961), which was commissioned by the Legislative Council of the Maryland General Assembly, found that the purpose of confining "dangerous criminals" was "the core of the project."[57]

Court, 426 P.2d 431, 438 (Wyo. 1967). *See also California v. Byers*, 402 U.S. 424, 451-452 n. 6 (1971) (privilege was "presumably available in the ordinary civil lawsuit context") (concurring opinion of Mr. Justice Harlan); *cf. In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967).

[56] In *Sas v. Maryland*, *supra*, 334 F.2d at 513, the Fourth Circuit found it "obvious" that at least the *primary* purpose of the defective delinquency law is not to provide treatment for delinquents. This seems clear, since the Maryland courts have held that a person can be confined as a defective delinquent even if he is not treatable. *Barnes v. Director*, 240 Md. 32, 212 A.2d 465 (1965).

[57] Since McNeil has been involuntarily deprived of his liberty, it does not matter whether Patuxent is denominated a rehabilitation center or penal institution, a hospital or prison, a psychiatric institution or penitentiary. It does help to focus on the realities, however, to note that Patuxent has virtually all of the attributes of a prison. The guards are not specifically trained and have no special qualifications. Tiers are closed off by steel doors. In addition, each cell is sealed by two separate doors—one "a steel grill work door that is always closed except when someone is going in or coming out" and the other a metal, solid door with a window. These cells are nine by six feet in size and have only a bunk, commode, wash basin, table and under drawer table for the bunk. Inmates can shower once a week. Those who engage in infractions are placed in "the hole;" it has only a bunk. Armed guards watch from towers inside a barbed wire fence surrounding the grounds. Murel J.A. Md. at 92-93, 256-257, 356, 517, 524, 536, 744-745; Murel J.A. 4 at 102-106, 319, 367-371. One psychiatrist was asked, "In the tours that you have had, can you tell us, does Patuxent strike you as a hospital." His

(Cont'd.)

In affirming the lower court's legal conclusion that the Fifth Amendment privilege against self-incrimination did not apply at the Patuxent examinations, the Fourth Circuit in *Tippett v. Maryland, supra,* leaned on its classification of Article 31B as a "civil" statute, and therefore held that the existing procedural safeguards were adequate. The court's statement that "although criminal conduct is necessarily bound up in every case, the inquiry does not focus on particular criminal acts but on the mental and emotional condition of the person" (436 F.2d at 1197) is simply incorrect. As discussed above, past criminal behavior by the inmate—indeed at least one criminal *conviction*—is essential to a finding of defective delinquency. Thus, one could hardly imagine a statute which focuses more directly on a "highly selective group inherently suspect of criminal activities." *Albertson v. SACB,* 382 U.S. 70, 79 (1965).[58]

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reply was: "It looks like a prison, to me." Murel J.A. Md. at 91; see also *id.* at 93, 109-110. Another said that Patuxent "actually, I believe, has far more locked doors and grill gates than this maximum security prison of the Navy." *Id.* at 132.

[58]In *Albertson,* a federal statute required members of organizations which the Subversive Activities Control Board had classified as "Communist-action organizations" to state in answer to a question on a printed form whether they were members of the Communist Party of the United States. This Court held that any member of the "highly selective group" at which this statute was directed was entitled not to answer this and other questions on self-incrimination grounds because members of the group were "inherently suspect of criminal activities."

At pages 86-87 of its brief in *Murel,* the State relies on *California v. Byers, supra,* to support its contention that the Fifth Amendment privilege against self-incrimination does not apply to the Patuxent examinations. The facts in *Byers,* which involved a California statute requiring automobile drivers in accidents causing property damage to stop and furnish their names and addresses, bear no resemblance to those here. The plurality opinion in *Byers,* applying the standards set down in *Albertson v. SACB, supra,* held that this California statute is "directed at * * * all persons who drive automobiles in California" and is therefore a neutral "regulatory" statute. 402 U.S. at 429-431. Hence, the privilege did not apply to protect a hit-and-run driver

(Cont'd.)

(c) Labeling The Statute "Civil" Does Not Dissipate The Dangers Of Self-Incrimination.

Constitutional safeguards do not turn on labels.[59] *In re Gault, supra.* In that case, the statute established what was labeled a "civil" proceeding to determine whether particular juveniles were "delinquents." This Court explicitly rejected the argument that the "civil" adjective selected by the state to describe the proceeding made the Fifth Amendment privilege inapplicable:

> [J]uvenile proceedings to determine "delinquency," which may lead to commitment to a state institution, must be regarded as "criminal" for purposes of the privilege against self-incrimination. To hold otherwise would be to disregard substance because of the feeble enticement of the "civil" label-of-convenience which has been attached to juvenile proceedings. * * * For this purpose at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called "criminal" or "civil". [387 U.S. at 49-50.]

The analytical approach required by *Gault* produces the same conclusion with regard to confinement at Patuxent. Article 31B establishes a procedure for determining whether a person should be confined as a "defective delinquent." The basis for making that determination is not only conviction of a crime but the additional finding that he is "an actual danger to society." This additional finding, not an element of the crime for which McNeil was convicted and sentenced, leads to indefinite incarceration. And it is the

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from prosecution for violating the statute. The defective delinquency statute at issue here, far from being "neutral" or "regulatory" as was the statute in *Byers*, is even more pointedly aimed at criminals and suspected criminals than was the statute in *Albertson*.

[59] While purporting to agree that labels are not determinative, the Fourth Circuit in *Tippett v. Maryland, supra*, 436 F.2d at 1156-1157, simply blinded itself to the overwhelming evidence in the record of the dangers of self-incrimination discussed above in the text.

evidence for this finding that the State here seeks to compel McNeil to provide from his own mouth.[60]

Even if one must determine that the Patuxent statutory procedure is "criminal" in order for the privilege against self-incrimination to be available, the foregoing discussion overwhelmingly supports the conclusion that the Patuxent procedure is criminal. In *Haskett v. State*, 263 N.E.2d 529 (Ind. 1970), a sexual psychopath law very similar to Maryland's "defective delinquency" law was held "criminal" on the grounds that (1) the act purported to define a "criminal sexual psychopathic person," (2) it applied to those with "criminal propensities," (3) it could be invoked only against persons charged with or convicted of a crime, (4) jurisdiction of proceedings under the act was in the criminal courts, (5) appeals were in the manner prescribed for criminal cases, and, (6) most important, a person determined to be a criminal sexual psychopath could be incarcerated in a mental institution for an indefinite period. On this basis, the *Haskett* court held that the Fifth Amendment privilege against self-incrimination applied to entitle a suspected sexual psychopath to refuse to answer questions at a psychiatric interview conducted to determine whether or not he was a sexual psychopath. Other than the Indiana statute's description of its subjects as "*criminal* sexual psychopaths," each factor applied by the *Haskett*

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[60] In his opinion for the Court in *McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971), Mr. Justice Blackmun described as "wooden" the approach of classifying statutes as "criminal" or "civil" in order to determine whether traditional criminal safeguards do or do not apply. Neither the analysis in *McKeiver* nor that in *California v. Byers, supra*, supports any contention that the applicability of a particular constitutional safeguard to a particular type of state proceeding should turn on the adjective selected by the state legislature or the state courts to describe the purpose of the statute. Instead, the proper approach under the standards laid down by this Court is carefully to analyze the evident dangers of self-incrimination flowing from compliance with the statute as administered by state authorities.

court is present here, and even this single distinction evaporates when one considers that conviction of a crime is a prerequisite to referral to Patuxent.

Furthermore, applying the privilege against self-incrimination at Patuxent referral examinations finds support in the developing weight of authority in the lower courts holding that the privilege applies at pre-trial psychiatric examinations.[61] The pre-trial and Patuxent examinations are generally similar with respect to the type of questions asked and the dangers of self-incrimination inherent in answering them. For example, at both the pre-trial and the Patuxent examinations:

- "There can be little doubt that in answering a psychiatrist's questions a defendant would be making an oral communication involving 'his consciousness of the facts and the operations of his mind'," and that therefore such a communication would be of the testimonial character protected by the privilege. *Commonwealth v. Pomponi, supra,* 284 A.2d at 710.
- "It is apparent that the defendant's answers to the psychiatrist's questions [concerning his conduct relating to the offense charged] might be incriminating upon any of the issues in trial, including the issue whether the defendant committed the act charged." *Shepard v. Bowe, supra,* 442 P.2d at 239.
- If the subject does not wish to raise any question about his mental competency, an "order compelling him to submit to examination, including

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[61] *E.g., French v. District Court,* 153 Colo. 10, 384 P.2d 268 (1963); *State v. Olson,* 274 Minn. 225, 143 N.W.2d 69 (1966); *State v. Obstein,* 52 N.J. 516, 247 A.2d 5 (1968); *Lee v. County Court,* 27 N.Y.2d 432, 318 N.Y.S.2d 705, 267 N.E.2d 452, *cert. denied,* 404 U.S. 823 (1971); *Shepard v. Bowe, supra; Commonwealth v. Pomponi,* 284 A.2d 708 (Pa. 1971). *Contra: United States v. Albright,* 388 F.2d 719 (4th Cir. 1968), relied upon at page 87 of the State's brief in *Murel.*

> discussion of the alleged criminal event if the examiner believes such questioning is necessary, violates his Fifth Amendment protection against self-incrimination." *State v. Obstein, supra,* 247 A.2d at 11.

Since there are substantial dangers of self-incrimination at the Patuxent examinations—including indefinite incarceration—even though the trial of the referred person has already ended in his conviction, the reasoning of the "pre-trial" cases discussed above applies with equal force here.

III. THE APPROPRIATE REMEDY

Although, as we have shown, the Patuxent staff has available to it a tremendous amount of material on each inmate and in at least one other case has rendered a report without the benefit of personal interrogations, we do not claim that this can be done in every case. We have cited these no-report cases to demonstrate the denial of equal protection and to show that Patuxent's inflexible position has been unreasonable and without factual foundation. We do not mean to imply that a finding of defective delinquency can automatically be made *in every case* without a personal interrogation. Each case would depend on what the record revealed as to that particular inmate. More particularly, we do not waive the right to attack a finding of defective delinquency as to McNeil, should one ever be made, either because his record fails to show defective delinquency or because his record affirmatively shows he is *not* a defective delinquent.

The point, however, is that if Patuxent cannot demonstrate defective delinquency without a personal interrogation, the appropriate remedy is not to deny a hearing or force the inmate to talk. "The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime."[62]

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[62] *United States v. White,* 322 U.S. 694, 698 (1944), quoted with approval in *Hoffman v. United States, supra,* 341 U.S. at 490.

"Psychiatrists have expressed the opinion that it is difficult at least in some cases, to arrive at a competent opinion on the mental state of the defendant if the defendant cannot be questioned about the alleged crime. * * * We are of the opinion that this is a price that must be paid to enforce the constitutional protection."[63] "These are rights of constitutional stature whose exercise a State may not condition by the exaction of a price."[64]

In this case, the staff has had almost six years to render a report—long past the statutory period for doing so and long past the expiration of McNeil's sentence. The State has kept this man incarcerated all of this time in prison-like surroundings without benefit of therapy or other help. To allow the State still more time at this late date to attempt to correct the situation would be to inflict on McNeil even a more grievous punishment than he has already endured. It is not primarily a question of fault on the part of the institution—although we strongly believe that Patuxent has acted improperly and without constitutional basis; the fact is that McNeil has simply served his time. Other than his original crime, for which he has already paid the price, he cannot be blamed for any part of what has occurred unless he is to be blamed for claiming his constitutional rights.

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[63] *Shepard v. Bowe, supra,* 442 P.2d at 241.

[64] *Garrity v. New Jersey, supra,* 385 U.S. at 500.

That being the case, we respectfully submit that the only appropriate remedy is to order McNeil promptly released from custody. That was the course followed in *Davis v. Director, supra,* and it is even more appropriate here.

Respectfully submitted,

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EXHIBIT A

LIST OF DATES ON WHICH EDWARD LEE McNEIL DECLINED TO ANSWER QUESTIONS ASKED BY PATUXENT DOCTORS BASED ON REVIEW OF PATUXENT FILES CONDUCTED ON 3/9/72

(McNeil was transferred to Patuxent on 8/10/66)

	Date	Name of Psychiatrist, Psychologist, or Guard Who Reported That McNeil Declined to Answer	McNeil File Source (File No. D-1885)
1.	10/8/66	Mr. Florenzo	Fm 220-1265 (pink form)
2.	10/11/66	Officer Cullen	Progress Sheet
3.	10/29/66	Dr. Cantrell	Fm 220-1265 (pink form) and Progress Sheet
4.	11/6/68	Dr. Meiller	Fm 220-1265 (pink form) and Progress Sheet
5.	7/25/69	Dr. Meiller	Fm 220-1265 (pink form) and Progress Sheet
6.	6/9/70	Dr. Klark	Fm 166-365 (psychiatric progress notes)
7.	6/19/70	Mr. Florenzo	Fm 220-1265 (pink form) and Progress Sheet
8.	8/10/70	Dr. Klark	Progress Sheet
9.	8/19/70	Dr. Klark	Fm 220-1265 (pink form) and Fm 166-365 (psychiatric progress notes)
10.	10/22/70	Dr. Klark	Fm 220-1265 (pink form), Fm 166-365 (psychiatric progress notes), and Progress Sheet
11.	3/2/71	Dr. Klark	Fm 220-1265 (pink form) and Progress Sheet
12.	9/30/71	Dr. Tasony	Fm 220-1265 (pink form) and Progress Sheet
13.	10/4/71	Mr. Florenzo	Fm 220-1265 (pink form) and Progress Sheet
14.	2/10/72	Dr. Tasony	Fm 220-1265 (pink form) and Progress Sheet
15.	2/14/72	Mr. Florenzo	Fm 108 (psychological report)

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5144

EDWARD LEE McNEIL,

Petitioner,

v.

DIRECTOR OF PATUXENT INSTITUTION,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF RESPONDENT

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HENRY R. LORD,
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April 17, 1972

The Daily Record Co., Baltimore, Md. 21203

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5144

EDWARD LEE McNEIL,

Petitioner,

v.

DIRECTOR OF PATUXENT INSTITUTION,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF RESPONDENT

OPINIONS BELOW

1. *State of Maryland, ex rel. Edward Lee McNeil v. Patuxent Institution, Criminal Court of Baltimore.*

2. *Edward Lee McNeil v. Director, Patuxent Institution,* Court of Special Appeals of Maryland, Sept. Term, 1970, No. 150, unreported per curiam opinion dated April 26, 1971 (J.A. 37).

JURISDICTION

The jurisdictional requisites are adequately set forth in Petitioner's Brief.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Milita, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV

Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

ANNOTATED CODE OF MARYLAND

Defective Delinquents — Article 31B

§ 6. Request for examinaton.

(a) *For whom requests may be made.* — A request may be made that a person be examined for possible defective delinquency if he has been convicted and sentenced in a court of this State for a crime or offense committed on or after June 1, 1954, coming under one or more of the following categories: (1) A felony; (2) a misdemeanor punishable by imprisonment in the penitentiary; (3) a crime of violence; (4) a sex crime involving: (A) Physical force or violence, (B) disparity of age between an adult and a minor, or (C) a sexual act of an uncontrolled and/or repetitive nature; (5) two or more convictions for any offenses or crimes punishable by imprisonment, in a criminal court of this State. A person convicted and sentenced for a crime or offense within one of the categories listed above in this subsection, except that such crime or offense was committed before June 1, 1954, shall be subject to this article with the same effect as if said crime or offense had been committed after June 1, 1954, if after said date such person is adjudged to have broken the terms

of any parole or probation on which he has been released from said sentence.

(b) *Who may make requests.* — The request for such examination may be made by the Department of Correction or by the State's attorney or assistant State's attorney who prosecuted the person for a crime or offense specified hereinabove in this section, on any knowledge or suspicion of the presence of defective delinquency in such person. Such person himself, or his attorney in his behalf, may make such a request of the court. Whenever a request for examination comes from any such source the court may order such person to be examined by the institution for defective delinquents to ascertain if he or she is a defective delinquent. The court also may make such an order on its own initiative. A copy of any order for examination shall be served upon the person to be examined.

(c) *When requests may be made.* — Such an examination may be requested and made at any time after the person has been convicted and sentenced for a crime or offense specified hereinabove in this section, provided that the said person has been sentenced to a period of confinement in a penal institution or is then serving such a sentence. No such examination shall be ordered or made if the said person has been released from confinement for the particular crime or offense of which he was convicted or who is within six months of the expiration of his sentence.

(d) *How requests made.* — The request for such an examination shall be by petition filed with the court having custody of or jurisdiction over the said person, stating therein the reasons for suspecting or supposing the presence of defective delinquency in the said person. The court in ordering such examination shall do so by formal

written order directed to Patuxent Institution. When the person to be examined is in the custody of the Department of Correction, such order shall also be directed to the Department of Correction, which shall forthwith cause the transfer of the person to the custody of Patuxent Institution.

(e) *Custody after examination ordered; jurisdiction of defendant.* — After the court has ordered an examination to be made under this section, said person shall be retained in custody, initially of the Department of Correction until his transfer to Patuxent Institution and thereafter in the custody of Patuxent Institution, until such time as the procedures of this subtitle for the determination of whether or not said person is a defective delinquent have been completed, without regard to whether or not the criminal sentence to which he was last sentenced has expired. The court which last sentenced the defendant, whether or not the term of court in which he was sentenced has expired shall retain jurisdiction of the defendant for the purpose of any of the procedures specified in §§ 6, 7, 8 or 9 hereof; except that the Criminal Court of Baltimore City and the Circuit Court of Anne Arundel County shall for such purposes have jurisdiction of a person last sentenced by the Municipal Court of Baltimore City and the People's Court of Anne Arundel County, respectively.

§ 7. Examinations.

(a) *By whom made; report of findings to court; time spent in institution, etc., credited on sentence.* — Any such examination shall be made by at least three persons on behalf of the institution for defective delinquents, one of whom shall be a medical physician, one a psychiatrist, and one a psychologist. They shall assemble all pertinent in-

formation about the person to be examined, before proceeding therewith, including a complete statement of the crime for which he has been sentenced, nature of the sentence, copies of any probation or other reports which may have been made about him, and reports as to his social, physical, mental and psychiatric condition and history. On the basis of all the assembled information, plus their own personal examination and study of the said person, they shall determine whether in their opinion, or in the opinion of a majority of them, the said person is or is not a defective delinquent. They shall state their findings in a written report addressed to the court, not later than six months from the date said person was received in the Institution for examination, or three months, before expiration of his sentence, whichever first occurs. If the substance of the report is that the said person is not a defective delinquent, he shall be retained in the custody of the Department of Correction under his original sentence as if he had not been examined for possible defective delinquency. Provided, however, that the said person shall be returned to the custody of the Department of Correction with full credit for such time as he has already spent in the institution for defective delinquents or within the custody of the Department of Correction including such allowances (or disallowances) relating to good behavior and/or work performed as the Board of Correction may determine under the provisions of § 688 of Article 27 of the Code.

(b) *Additional examinations by psychiatrist in certain cases.* — In addition to the examination provided in the foregoing subparagraph (a), whenever a request has been made to examine any person for defective delinquency, other than a request made by such person himself or by his attorney on his behalf, and whenever the

court has on its own initiative ordered examination of any person, then such person shall be entitled, upon request, to be examined by a practitioner of psychiatry of his own choice for the purpose of determining whether he is a defective delinquent within the terms of this article; and the reasonable costs of such examination shall be defrayed by the State of Maryland from the appropriations to the judiciary, in such amount as may be approved by the court. The report of examination made by such psychiatrist shall be submitted in writing addressed to the court.

QUESTIONS PRESENTED FOR REVIEW

I. Whether an individual tried, convicted, and sentenced for a particular category of crimes and then referred by court order to Patuxent for evaluation is thereby denied due process or possesses a right to remain silent or a right to refuse to cooperate with professional staff seeking an evaluation of his mental condition.

II. Whether an individual tried, convicted, and sentenced for a particular category of crimes and then referred by court order to Patuxent for evaluation has his constitutional rights violated by retaining him until such time as he cooperates with the professional staff seeking to determine whether or not he is a defective delinquent.

APPENDIX DESIGNATION

Respondent notes the references by Petitioner to the record in *Murel v. Baltimore City Criminal Court*, No. 70-5276, argued in this Court on March 28-29, 1972. Respondent has no objection to citation to the same in order to provide a full and accurate background for a determination of the issues herein.

For the purpose of reference, the Joint Appendix filed in the United States Court of Appeals for the Fourth Circuit in *Tippett v. Maryland*, 436 F. 2d 1153 (4th Cir., 1971) will be hereinafter designated as "(J.A. 4)." The Joint Record Abstract filed in the Court of Appeals of Maryland in *Director v. Daniels*, 243 Md. 16, 221 A. 2d 397 (1966) will be hereinafter designated as "(J.A. Md.)." Citations to the Joint Appendix filed in this case will be designated as "(J.A.)" in conformity with Petitioner's Brief.

STATEMENT OF THE CASE

History and Background of Article 31B, Annotated Code of Maryland

Article 31B, Annotated Code of Maryland evolved because of the recognition that there existed a group of offenders whose crimes resulted from a mental abnormality or character defect which resulted in persistent antisocial conduct due to lack of emotional control and sometimes accompanied by a deficient intelligence. These individuals did not respond to normal penalogical methods, and it was felt that they should be placed in an institution providing proper psychiatric care.

The Act was a culmination of two studies made by two committees, one appointed by the Governor of Maryland in 1947, and one appointed by the Maryland Board of Corrections. The two groups made a joint recommendation which ultimately resulted in the passage of Article 31B. See generally, *Director v. Daniels*, 243 Md. 16, 221 A. 2d 397 (1966); *Sas v. Maryland*, 334 F. 2d 506 (4th Cir., 1964); "Research Report No. 29," Research Division of the Legislative Council of Maryland (December, 1950).

The Act sets up a comprehensive scheme for referral, examination, commitment and release. Following a conviction and the imposition of an active prison sentence for:

> "(1) A felony; (2) a misdemeanor punishable by imprisonment in the penitentiary; (3) a crime of violence; (4) a sex crime involving: (A) physical force or violence, (B) disparity of age between an adult and a minor, or (C) a sexual act of an uncontrolled and/or repetitive nature; (5) two or more convictions for any offenses or crimes punishable by imprisonment . . ." Art. 31B, § 6(a).

An individual may be referred to Patuxent Institution for examination and evaluation as to his status as a defective delinquent by a request directed to the court from the State's Attorney, the Department of Corrections, the person himself, his attorney in his behalf, or the court on its own initiative. Article 31B, §6(a) and (b). Requests may be made for examination unless the individual referred has been released from confinement for the particular crime of which he was convicted, or who is within six months of the expiration of his sentence. A copy of the order of court referring an individual to Patuxent Institution for examination and evaluation is served on the individual referred. Article 31B, §6(b) and (c).[1]

Patuxent Institution is required by statute to:

> ". . . [A]ssemble all pertinent information about the person to be examined, before proceeding therewith, including a complete statement of the crime for which he has been sentenced, the circumstances of such crime, the court in which he was sentenced, the nature of the sentence, copies of any probation or other reports which may have been made about him, and reports as to his social, physical, mental and psychiatric condition and history." Article 31B, § 7(a).

---

[1] This section was amended in 1971. The statutory language under which Petitioner was referred to Patuxent was as follows: "No such examination shall be ordered or made if the said person has been released from confinement for the particular crime or offense of which he was convicted." This amendment would not have affected Petitioner's referral to Patuxent Institution.

The report to the court must be filed "not later than six-months from the date said person was received in the institution for examination, or three months, before expiration of his sentence, whichever first occurs." Article 31B, § 7(a).[2]

If the report of Patuxent Institution states that the individual is not a defective delinquent, he is returned to the custody of the Department of Corrections under his original sentence with credit for all time spent at Patuxent Institution. Article 31B, § 7(a). Since 1955, Patuxent Institution has diagnosed 1958 individuals, of whom 34 percent were found by the staff not to be defective delinquents. "Patuxent Institution, Annual Report, 1971."

If the report concludes that the individual is a defective delinquent, he is given a full and prompt judicial hearing in which he is entitled to counsel; trial by jury; the services of an independent psychiatrist at the expense of the State; full access to all records, reports and papers in possession of Patuxent Institution; and the right to subpoena witnesses. Article 31B, § 8(a), (b) and (c). Since 1955, of those patients having an original commitment proceeding before a court, 13 percent were found not defective delinquents, and of those patients having an original commitment proceeding by a jury, 20 percent were found not defective delinquents.

The hearing to determine whether the individual is a defective delinquent is held "no less than 30 days follow-

[2] This section was also amended in 1971. The section at the time of Petitioner's referral to Patuxent Institution read as follows: "They shall state their findings in a written report addressed to the court, not later than six months from the date said person was received in the Institution for examination, or before expiration of his sentence, whichever last occurs." This amendment, also, would have had no effect on Petitioner's status at Patuxent Institution.

ing designation of counsel, unless acceleration of the time is requested by the person or his counsel." Article 31B, § 8(b).[3]

If the court or jury finds the individual to be a defective delinquent, he is committed to Patuxent Institution for an indeterminate period with the right of judicial review after the expiration of the greater of two years or two-thirds of his original sentence and at three-year intervals subsequent to the original redetermination hearing. Article 31B, §§ 9(b), 10(a) and (b). If the court or jury finds that he is not a defective delinquent, he is returned to the custody of the Department of Corrections to serve his original sentence with full credit for the time spent at Patuxent Institution. Article 31B, § 9(a). Appellate review of original or redetermination hearings is preserved. Article 31B, §§ 11, 11A.

The Institutional Board of Review by statute (§ 12) consists of the Director of Patuxent Institution, the three Associate Directors, the Professor of Constitutional Law of the University of Maryland School of Law, who is a member of the Advisory Board of Patuxent Institution, one of the members of the Maryland Bar who is a member of the Advisory Board, and a sociologist appointed by the Board of Governors of Patuxent Institution from the faculty of an accredited institution of higher education in Maryland. The Act provides that the Institutional Board of Review

[3] Article 31B, § 6(e) places the patient in the custody of Patuxent Institution "until such time as the procedures of this subtitle for the determination of whether or not said person is a defective delinquent have been completed, without regard to whether or not the criminal sentence to which he was last sentenced has expired." This section refers to the judicial hearing following the report of the Institution, which must be made within six months of the patient's arrival at Patuxent Institution or three months before the expiration of the patient's sentence. Article 31B, § 7(a).

shall review and thoroughly re-examine every person committed to Patuxent Institution at least once every calendar year. Such review and examination is used to determine whether the person shall remain classified as a defective delinquent, and the Act further provides that in ". . . making such determination, the board shall assemble such information, use such tests and follow such procedures as then are being utilized to indicate the presence of defective delinquency." Article 31B, § 13(b). The Board is required to make a recommendation for the future status and treatment of each patient, in writing, which recommendation is filed in the patient's record at Patuxent Institution. Article 31B, § 13(a) and (b). Further review is available through the use of the Writ of Habeas Corpus. Article 31B, § 10(c).

The Institutional Board of Review has the power to grant "status," that is, leaves of absence, holiday leave, work release and parole, and to report to the committing court when it finds the patient no longer a defective delinquent. It may also recommend release of the patient unconditionally without regard to whether his original criminal sentence is still in effect. Article 31B, § 13(b), (d) and (f). In the past several years, the number of patients committed to Patuxent Institution as defective delinquents has about equalled the number paroled by the Institutional Board of Review.

The statutory scheme for examination at Patuxent Institution is unique among the statutes in this country for evaluating individuals who are not legally insane, but possess a character defect which propels them into criminal activity. "Any such examination shall be made by at least three persons on behalf of the institution for defective delinquents, one of whom shall be a medical physician, one a psychiatrist, and one a psychologist." Article 31B, § 7(a).

"The institutional medical team, in examining any individual properly referred to it, employs recognized psychiatric techniques, including among other things, a psychiatric interview and evaluation in depth, a full battery of psychological tests, full sociological and social work studies, including electroencephalographic studies, review of past history and records, including police, juvenile, penal and hospital records, and, in addition, personal interviews with the accused's family, when feasible, and with the accused, are held. *These procedures are the accepted practice in matters involving psychiatric evaluation and the techniques employed in state and private mental hospitals, as well as by private physicians, all of which are essential to any accurate psychiatric diagnosis.*" *Director v. Daniels, supra*, 243 Md. at 57 (Emphasis supplied)

All other statutes, State and Federal, requiring evaluation, as above, do not contain the statutory requisites found in Article 31B to insure a comprehensive medical diagnosis, nor do they contain the safeguards available in Article 31B. The following is a list of jurisdictions having "sexual psychopath" statutes or statutes similar to Article 31B, and the evaluation requirements thereof:

Jurisdiction	*Statute*	*Evaluation Requirements*
1. United States	Title 18, §§4241,4247	Initially examined by (1) a medical officer appointed by the Warden, (2) a medical officer appointed by the Attorney General, (3) a competent expert in mental diseases appointed by the Surgeon General of the Public Health Service; under some circumstances by a psychiatrist designated by the court and a psychiatrist selected by the prisoner.
	Title 18, §3413 (Narcotic Addict Treatment Statute)	Two physicians, one of whom must be a psychiatrist.

Jurisdiction	*Statute*	*Evaluation Requirements*
2. Alabama	Ala. Code, Title 15, §437	Two qualified psychiatrists whose practice is exclusively limited to diagnosis and treatment of mental disorders.
3. California	Cal. Welfare and Inst'ns. Code, §6307	Two or three psychiatrists whose practice has been directed to diagnosis and treatment of mental and nervous disorders for not less than five years.
4. Colorado	Col. Rev. Stat. Ann. §39–19–2	Psychiatrists from the Colorado Psychopathic Hospital or as appointed by the court.
5. District of Columbia	D.C. Code Ann., §22–3506	Two qualified psychiatrists.
6. Florida	Fla. Stat. Ann., §917.17	Two or three qualified psychiatrists with five years' experience in mental and nervous disorders.
7. Illinois	Ill. Ann. Stat., Ch. 38–105–4	Two psychiatrists.
8. Iowa	Iowa Code Ann., §225A.4	Medical examination may be required.
9. Kansas	Kan. Gen. Stat. Ann. §62–1535–36	Mental examination and report by a psychiatrist at a state hospital.
10. Massachusetts	Mass. Ann. Laws, Ch. 123A–4	Two psychiatrists.
11. Minnesota	Minn. Stat., §2634	Two duly licensed doctors of medicine.
12. Missouri	Mo. Ann. Stat., §202.20	Two qualified physicians.
13. Nebraska	Neb. Rev. Stat., §29–2902	Two licensed physicians with two years training in mental diseases.
14. New Hampshire	N.H. Rev. Stat. Ann. §173–A :3	Referred to New Hampshire hospital for evaluation.
15. New Jersey	N.J. Stat. Ann., §2A :164–3	Referred to New Jersey Diagnostic Center.
16. Ohio	Ohio Rev. Code Ann. §2947.25	Referred to the psychopathic clinic or three psychiatrists.
17. Pennsylvania	Pa. Stat. Ann. Tit. 19, §1167, 1169	Examination by facilities of the Department of Welfare or by a psychiatrist whose report must be accepted by the Department.

Jurisdiction	*Statute*	*Evaluation Requirements*
18. South Dakota	S.D. Cod. Laws, §22–22–9	Referred to the South Dakota State Hospital.
19. Tennessee	Tenn. Code Ann., §33–1303	Examination by a psychiatrist or psychiatrists from the Department of Mental Health.
20. Utah	Utah Code Ann., §77–49–2	Two or more competent and reputable physicians recognized as specialists and experts in the field of psychiatry.
21. Vermont	Vt. Stat. Ann. Tit. 18, §8504	Adequate psychiatric examination.
22. Virginia	Va. Code Ann., §53–278–3	Referred to the Department of Mental Hygiene.
23. Washington	Rev. Code Wash. Ann., § 71.06.040	Initially examined by two duly licensed physicians, and if reasonable grounds to believe that the individual comes within the statute, then to the state hospital for examination.
24. Wyoming	Wyo. Comp. Stat. Ann., §7–349	Two qualified physicians (or one if only one available); one to be a psychiatrist, if possible.

The unique feature of Article 31B, which requires the tripartite examination, sets the Act apart from all other similar statutes. The foregoing compilation of statutes clearly illustrates the thoroughness with which Article 31B was drafted by incorporating the combined skills of three closely related disciplines. On this point, Dr. Manfred S. Guttmacher, whose lengthy qualifications are fully set forth in *Director v. Daniels*, *supra*, 243 Md. at 66, stated that:

> "I think you need a full psychiatric examination, you need full sociological and social work study. I think you need a full battery of psychological tests, and I think it is very helpful to have an individual under a more prolonged surveillance such as you would have in a hospital or an institution like Patuxent where you can get observations as to his day to day behavior and

how he adjusts or maladjusts with his peers" (J.A. Md. 173).

Dr. Harold M. Boslow, Director of Patuxent Institution, testified before the United States District Court for the District of Maryland in *Sas v. Maryland*, 295 F. Supp. 389 (D. Md. 1969) that in order for a psychiatrist to make a diagnosis under Article 31B, §5, a personal examination of the patient is necessary.

> "(The Court) You would not feel that a paper record — suppose that you had the reliable records with respect to previous institutionalization, and that you had data of, again reliable, his conduct on the outside, and that over a period, let's say, of two years you, and by you I mean the staff, the man being there, sees him, sees what he does, how he acts and so on, would that, or would it not, of itself be enough to satisfy you that you could make a diagnosis?
>
> "(The Witness) No, sir, I would feel that I could not make an adequate professional judgment on that basis. . . . *no sir, because it would be unfair to both the patient and the man giving the opinion.* The patient might be psychotic, for all you know, and you would not be able to evaluate this without an interview. . . .
>
> "(The Court) Because it might be something more than defective delinquency; it might be an actual psychosis?
>
> "(The Witness) Yes, sir." (J.A. 4, 311-313) [Emphasis supplied.]

Respondent respectfully submits that the paucity of the record below has forced Petitioner and Respondent to rely on testimony not properly in the record in this case, but in order to assist this Court in evaluating the issues, Respondent has included in this Brief affidavits from the Director of Patuxent Institution, the Chief Psychiatrist and Chief Psychologist at Patuxent Institution explaining the

necessity for personal interviews by the psychiatrist and psychologist who make the evaluation required by law at Patuxent Institution. The affidavit of Dr. Giovanni Croce, Associate Director of Patuxent Institution, in Appendix A of this Brief, which is found at page 1a, Chief of the Psychiatric Department of Patuxent Institution, clearly evidences the difficulty in arriving at a *valid* diagnosis of defective delinquency without a personal interview. Also, Dr. Manfred Guttmacher testified in *Director v. Daniels*, *supra*, that:

> "Well, we have very few objective tests in our field. The same thing is true, of course, in the commitability to a hospital. If the patient remains completely silent you would have great difficulty in making a diagnosis. You would have to have a long period of surveillance to be able to arrive at a diagnosis. It is what the patient says, and what the patient does and the doing is very important as well as the saying" (J.A. Md., 258).

Although it is possible in certain instances for a psychiatrist to make a diagnosis when the individual refuses to cooperate in the diagnostic procedure, the validity of such a diagnosis might be questionable, and the necessity for the same is clearly shown in the affidavit in Appendix A, which appears at page 1a. Article 31B sets forth meticulous standards and procedures to be followed in order to provide greater protection to the individual being diagnosed. Respondent and the staff at Patuxent Institution use their best efforts in order to assure that any examination is as valid as possible under current medical standards.

The area completely ignored by Petitioner in his Brief is the statutory requirement that a full psychological examination be given and diagnosis made by qualified psychologists. "Then a battery of psychological tests is given.

This is given routinely. This is required by law contradistinction to the mental hospital system, where they are only done on a selected basis" (J.A. Md., 621). This clearly points to the draftsmen's overriding interest in obtaining a valid diagnosis of defective delinquency. A psychologist would find it impossible to make a valid diagnosis without the benefit of the tests which he personally administers. The necessity for his testing and the reasons for the use of each test are fully set forth in the affidavit of Dr. Sigmund Manne, Chief Psychologist at Patuxent Institution, in Appendix B of this Brief, which appears at page 4a. Dr. Arthur Kandel, Associate Director of Patuxent Institution, testified in *Director v. Daniels, supra,* that he would not, as the examining psychologist, render an opinion on whether or not an individual was a defective delinquent without personally interviewing the patient himself. He stated that he could not rely on the tests of others unless he knew that the tests were valid, but in no event would he give a recommendation as to defective delinquency without a personal interview of the patient (J.A. Md., 224-226, 272-274). The essence of his testimony was that a determination based on tests and data received from other psychologists would lack the proper validity unless all the information comprising the tests were before him, and he had a chance to personally interview the patient. The necessity for psychological evaluation as part of a valid diagnosis was clearly pointed out in "Research Report No. 29," *supra,* where the doctors responsible for the medical aspects of the report stated that the stage of development had been reached where psychological and psychiatric diagnosis of those sent for evaluation could be validly ascertained. "Medical authorities emphasize what they consider to be the failure of our criminal law to take into account proven achievements of our psychologists and psychiatrists." "Research Report No. 29," *supra,* at page 7.

Following a patient's arrival at Patuxent Institution for evaluation, he is seen by members of the Classification and Social Service Departments and is informed about the rules and regulations of the institution, the proposed examinations, and the use to be made of the same. He receives a complete physical examination, including an electroencephalogram, in order to determine any organic basis for possible mental aberrations. The Classification Department sends out its requests to the patient's schools, employers, hospitals, penal institutions, parole authorities and the Federal Bureau of Investigation, in order to obtain as much background data on the patient as is possible. The Social Service Department obtains a social history of the patient and his family, when possible. Within 45 to 60 days, the patient is seen by the psychiatrist and psychologist assigned to him, and the tests necessary for a valid determination as to whether or not the patient is a defective delinquent are made. The report to the court is usually made within 90 days following the patient's admission to Patuxent Institution (J.A. Md., 621, 669); (J.A. 4, 200-202, 270). The report must be made to the court within six months of the patient's arrival at Patuxent Institution. Article 31B, §7(a).

Subsequent to the examination, the individual is "staffed". He appears before a staff meeting consisting of all the professional persons available at that particular time, whose number ranges from 6 to 14 persons, but always includes each individual who personally examined the patient. All of the test protocols are evaluated, and each examining member presents his findings. The patient is brought in, and the staff has the opportunity to personally examine him and go over the reports with him. When the patient leaves, the staff discusses and decides on its recommendation. Every professional member at the staff

meeting votes, and a majority of those present and a majority of the examining professionals is necessary before a recommendation that the individual be committed as a defective delinquent is made.

Following commitment to Patuxent Institution as a defective delinquent, the individual enters the treatment program which is designed ". . . to develop internal controls within the individual in order that he may learn sufficient restraint to become a useful member of society. Otherwise stated, such aim is to enable defective delinquents, through treatment, to control their tensions, and more specifically to help the individual gain insight into his behavior, to accept responsibility for himself and others, to adjust with relationship to his peers and authority figures, to tolerate frustration and postpone gratification of instinctional demands." *Director v. Daniels, supra,* 243 Md. at 58. Treatment at Patuxent Institution consists of a total therapeutic program incorporating psychotherapeutic, educational, religious and recreation programs and a highly structured social system and therapeutic milieu. A graded-tier system with tier counseling was evolved to reward socially desirable behavior.

Patuxent Institution has magnified and intensified its therapy through the creation of Unit Treatment Teams which allow patients continuing therapy within the group (J.A. 4, 179-180, 183-185). Patuxent Institution also provides holiday and leave status, innovative vocational rehabilitation, speech therapy, and work release programs. A halfway house located in Baltimore City provides meaningful psychiatric after-care to parolees with daily therapy and counseling programs and the presence of a full time staff member living on the premises. After-care for those not in the Baltimore City area is provided by the staff in other parts of the state (J.A. 4, 174-178, 318).

Recent additions to Patuxent's physical structure include a new school building, chapel, additional shop space and the aforementioned halfway house, located in Baltimore City. Patuxent Institution's per capita budget is $7,994.00 for fiscal 1971 as compared with the following:

1. Maryland Penitentiary — $4,209.00
2. House of Correction — $3,592.00
3. Maryland Correctional Institution — Hagerstown — $3,931.00
4. Correctional Camp System — $2,438.00
5. Central Laundry — $2,103.00

Patuxent Institution is currently budgeted for the following positions directly related to the welfare of the patients:

1. Psychiatrists — 10
2. Psychologists — 11
3. Social Workers — 17
4. Educational Personnel — 9
5. Vocational Personnel — 11
6. Recreational Personnel — 4
7. Medical Personnel — 12
8. Classification Personnel — 6
9. Dietary — 9

This personnel is available for the current population at Patuxent Institution which consists of 316 committed patients and 176 patients in diagnosis.

Edward Lee McNeil

Petitioner was indicted for the crimes of attempted rape (Indictment No. 2392/1966), assault (Indictment No. 2393/1966) and assault (Indictment No. 2394/1966) and was arraigned in the Criminal Court of Baltimore on June 1, 1966, where Petitioner entered a plea of not guilty to all three indictments. Subsequently, on July 12, 1966, he was tried in the Criminal Court of Baltimore by Judge J. Harold Grady, without a jury.

The complaining witness under the attempted rape indictment, Ruby Berry, testified that Petitioner grabbed her around the neck, dragged her into an alley and attempted to rape her. She positively identified Petitioner as her assailant (J.A. 3-4). Jerome Johnson, the arresting police officer, testified that at 2:21 A.M., on May 1, 1966, he was patrolling in the vicinity of 22nd and St. Paul Streets in Baltimore, Maryland, when he heard a woman screaming for help. He extinguished the headlights on his patrol car and proceeded north on Hargrove Street when he observed a male running towards the car. When apprehended, Petitioner's clothes were disarranged and his trousers were unzipped in the front. Petitioner struck Officer Johnson's partner, and Officer Johnson chased Petitioner several blocks where he was subdued (J.A. 26-27). An independent witness, Jack Moore, testified that he observed a struggle between a police officer and Petitioner and assisted the officer in physically subduing the Petitioner (J.A. 10-11). Mr. Moore stated that after Petitioner was subdued, he kept repeating "No, Lord, no; not again . . . I didn't hurt that woman" (J.A. 12).

Petitioner testified denying any implication in the crime, but stated on direct examination that he had received probation before verdict on prior charges of assault and rape

and assault and battery (J.A. 17). The court found Petitioner guilty of attempted rape under Indictment No. 2392/1966 and assault under Indictment No. 2393/1966.

The court, having before it testimony involving Petitioner in an attempted rape, two assaults, and prior adjudications of assault and rape and assault and battery, referred Petitioner to the Medical Department of the Supreme Bench of Baltimore City for a psychiatric evaluation in order to gain additional information for disposition.

The report of the Medical Officer in his summary and recommendation revealed the following:

> "The psychological examination reveals an intelligence level within the average range, full scale I.Q. of 104. It also indicated impulsiveness and vulnerability to anxiety followed by acting out. This acting out could follow his fantasy preoccupations which have to do with women, blood, high heel shoes and thighs.
>
> "There is no evidence of psychosis and the patient must be considered responsible under the Maryland Law, for his behavior. It is difficult to assign a diagnosis to this young man; he is not antisocial in the sense that he uses society as an enemy to be attacked. His unstable character structure does not permit adequate control when under stress and we do not know enough about his social life or lack of it. I would suggest a diagnosis of personality pattern disturbance, schizoid type, which would encompass his vulnerability to stress. This young man is certainly a danger to society and the rigidity of his defenses which do not permit a consideration of his offense, even after he had been found guilty, can be taken as a pessimistic sign that further offenses may occur.
>
> "In view of the above, I recommend that the Patient be considered for evaluation and treatment as Patuxent Institution." *McNeil v. State*, No. 204, Init. Term, 1967, Court of Special Appeals of Maryland, pages 14-18.

At sentencing, the court with Petitioner's prior record of antisocial behavior and the pre-sentence Medical Report from the Medical Department of the Supreme Bench of Baltimore City before it, sentenced Petitioner to five years imprisonment under Indictment No. 2392/1966 and to one year imprisonment under Indictment No. 2393/1966, the sentences to run concurrently. The court then further referred Petitioner to Patuxent Institution for evaluation and determination as to his status as a defective delinquent (J.A. 33).

Petitioner was received at Patuxent Institution on August 10, 1966, for evaluation as to his status as a defective delinquent. On August 29, 1966, Petitioner appealed his criminal conviction to the Court of Special Appeals of Maryland which denied relief in an unreported *per curiam* decision filed July 21, 1967. *McNeil v. State*, Init. Term, 1967, No. 204. The mandate of the Court of Special Appeals of Maryland was docketed in the Criminal Court of Baltimore on August 22, 1967. Petitioner subsequently filed in the Court of Appeals of Maryland a Petition for Writ of Certiorari to the Court of Special Appeals of Maryland, which was denied by the Court of Appeals of Maryland on November 6, 1967.

On September 28, 1967, Petitioner filed his first petition under the Uniform Post Conviction Procedure Act, Article 27, §645(a) *et seq.*, Annotated Code of Maryland, which was denied on June 28, 1968, by Judge Thomas J. Kenney in the Criminal Court of Baltimore. An application for leave to appeal to the Court of Special Appeals of Maryland was denied on November 21, 1968. Petitioner subsequently filed his second petition under the Uniform Post Conviction Procedure Act, *supra*, on January 23, 1970, and relief was denied by Judge Basil A. Thomas in the Criminal

Court of Baltimore on August 17, 1970. An application for leave to appeal to the Court of Special Appeals of Maryland was denied on April 26, 1971. Petitioner's third petition under the Uniform Post Conviction Procedure Act, *supra*, was filed on January 18, 1971, and relief was denied on June 9, 1971, by Judge Robert B. Watts of the Criminal Court of Baltimore. Petitioner has similarly filed four petitions for the issuance of the Writ of Habeas Corpus in the United States District Court for the District of Maryland, which petitions were denied. Petitioner also filed three petitions for the Writ of Habeas Corpus in Montgomery County, Maryland, Baltimore County, Maryland, and Baltimore City, Maryland, which were similarly denied.

Petitioner's adjustment at Patuxent Institution, even in those areas where it would be beneficial to him, has been poor. He has refused on 18 occasions to participate in the evaluation procedures and also has refused to participate in any of the other available programs.

Date	*Patuxent Official*	*Reasons*
1. 9/16/66	Mr. Simms Social Worker	Refused to cooperate in social history interview. Petitioner stated that his appeal was pending.
*2. 9/19/66		Refused to go to school.
*3. 9/21/66		Refused to go to school. Petitioner stated he wanted to be dropped from the school list.
4. 9/27/66	Mr. Wimmer	Petitioner refused to become involved in the California Achievement Testing Program.
5. 10/8/66	Mr. Florenzo	Refused psychological examination. Petitioner gave no reason, and refused to leave his tier.
6. 10/11/66		Refused to attend staff.
7. 10/29/66	Dr. Cantrell	Refused to appear for psychiatric examination.
8. 12/12/66	Mr. Simms	Refused to discuss social history.
9. 11/6/68	Dr. Meiller	Petitioner refused psychiatric examination "on advice of my lawyer."
10. 7/25/69	Dr. Meiller	Refused psychiatric examination. No reason given.

* Formal non-cooperation unrelated to evaluation.

Date	*Patuxent Official*	*Reasons*
11. 6/9/70	Dr. Klark	Refused psychiatric examination. "I don't want to talk to you, you can go and talk to my lawyer!"
12. 6/16/70	Mr. Florenzo	Refused psychological examination. Petitioner stated "I have to think about it. I can't make a final decision right now."
13. 8/10/70	Dr. Klark	Refused psychiatric examination.
14. 8/19/70	Dr. Klark	Refused psychiatric examination. Petitioner stated "I have nothing to say."
15. 10/22/70	Dr. Klark	Refused psychiatric examination. Petitioner stated "I don't want to talk to you and to no doctor!"
16. 3/2/71	Dr. Klark	Refused psychiatric examination.
17. 9/30/71	Dr. Tasony	Refused psychiatric examination. Petitioner stated that he was not ready as yet, but may cooperate within a few months.
18. 10/4/71	Mr. Florenzo	Refused psychological examination. Petitioner stated that he had court litigation pending and was waiting for the determination.
19. 2/10/72	Dr. Tasony	Refused psychiatric examination. Petitioner informed Dr. Tasony that he had informed them about his refusal and became extremely angry and hostile.
20. 2/14/72	Mr. Florenzo	Refused psychological examination. Petitioner stated "The answer is still the same. Pending advice of counsel, I have nothing to say."

Petitioner's statement in his Brief that the first three attempts to examine him while his direct appeal was pending overlooks the statutory language of Article 31B, §7(a), which requires the report to be made to the court within six months of the arrival of the patient at Patuxent Institution. Petitioner further complains about a letter sent to Judge Albert L. Sklar of the Criminal Court of Baltimore dated May 23, 1967, indicating why Petitioner had not been diagnosed as required by Article 31B, §7(a). This is done routinely at Patuxent Institution when a diagnosis runs beyond the statutory period in order to so inform the court and was not sent in response to Petitioner's letter to the United States District Court for the District of Maryland at or about the same time.

The lapse of time between the fourth recorded formal request for examination was necessitated by Petitioner's persistent refusal to see his examining doctors. When such a situation occurs at Patuxent Institution, informal contacts with the patient are made periodically to see whether he is willing to cooperate in the examination. When the informal method produces no results, Patuxent Institution resorts to its more formal method of contacting and requiring the patient to appear before the doctor and announce verbally that he does not wish to be examined. This is done in order to obviate criticism from other courts that Patuxent Institution makes no effort to diagnosis its recalcitrants.

Petitioner's statement that he "would have been released over four years ago if he had been confined at the Maryland Correctional Institution in Hagerstown and served the minimum time provided by law with respect to his sentence . . ." is inexact. Parole is not a matter of right, nor is it automatic, and as Article 41, §122, Annotated Code of Maryland, only sets forth the minimum time in which one is eligible for parole, this statement is pure conjecture and intimates that Petitioner has adjusted properly within the institutional setting. Among other things, Petitioner was disciplined at Patuxent Institution for possession of a weapon on February 12, 1967; disrepect to an officer on August 16, 1967, when Petitioner threatened to "knock the hell out of" the officer; and fighting on August 8, 1968. These three infractions occurring early in Petitioner's stay at Patuxent Institution would, more than likely, have destroyed any chance that Petitioner had for parole if he had been confined at the Hagerstown Correctional Institution.

The total amount of information contained in Petitioner's file at Patuxent Institution is short social history, a record of his prior offenses, including an assault, for which he was

detained in the Maryland Children's Center for 30 days in 1960, as a juvenile, and convictions of robbery and rape for which he received probation before verdict in December, 1965, in the Criminal Court of Baltimore. Petitioner spoke briefly with Dr. Tasony, a psychiatrist at Patuxent Institution, on September 5, 1966, but thereafter refused any cooperation. The file also contains the report of the Medical Officer of the Supreme Bench of Baltimore City dated July 19, 1966, and a brief report from the Maryland's Children Center directed to Judge Charles E. Moylan, of the Supreme Bench of Baltimore City, sitting as a Juvenile Court Judge, following Petitioner's referral to the Children's Center after the finding of delinquency for assault. As evidenced by the Affidavit attached hereto as Appendix C of Respondent's Brief, at page 15a, a diagnosis under Article 31B, §7(a) on the basis of this material would be invalid.

Statistical Data

Petitioner, throughout his Brief, raises the spectre of a life sentence under Article 31B. Patuxent Institution began operating in 1955, and there is no one at Patuxent Institution who has been there since 1955 and who has not had at least one opportunity to be free on parole. The only exception is an individual transferred to a mental hospital who escaped from that hospital and was at large for 10 years. Patuxent Institution is not a life sentence, and experience dictates to the contrary. The median sentence of those committed to Patuxent Institution is 10 years. The first quartile ranking is 5 years; the third quartile ranking is 18 years; and the fourth quartile range is 20 years or more. Of the 380 committed patients on first parole from Patuxent Institution, the median stay prior to parole is 5 years, the first quartile ranking is 3 years, the third quartile ranking is 7 years; and the fourth quartile range is 1 year,

6 months to 14 years, 5 months. This includes all time spent by the individual under his original criminal conviction prior to the time he was transferred to Patuxent Institution for evaluation.

Patuxent Institution's figures show that on April 3, 1972, of 176 men in diagnosis, 9 are beyond their original criminal sentences and have not been diagnosed because they have refused to cooperate with the evaluation procedure. Four patients of the 176 are beyond the expiration of their sentence, but have been diagnosed and are awaiting the judicial hearing to determine whether they are defective delinquents.

From about 1965 until recently, there was always a group of approximately 25 individuals in diagnosis who refused to be examined. They were generally not the same individuals, but the number in the group was fairly consistent. Recently, the number of those refusing to be evaluated has increased and as of April 3, 1972, 72 of the 176 men in diagnosis have refused to be evaluated.

Miscellaneous

Petitioner's insistent complaint throughout his Brief is that he received no treatment at Patuxent Institution. Petitioner's Brief, pages 15 and 23. What Petitioner fails to state is that it is impossible to treat an individual until determination of the cause of the ailment is made. In Petitioner's case, he has refused to allow the staff to determine whether, in fact, he is a defective delinquent in order that treatment might be provided. Further, Petitioner has made every effort to deny himself any of the opportunities available at Patuxent Institution, including his refusal to attend the school program.

Petitioner's reference at page 25 of his Brief in footnote 30, to the Wechsler-Bellevue Intelligence Test, the

Rorschach Inkblot Test and the Draw-A-Person test are typical examples of the necessity of a personal interview. Without a personal interview, the administration of these tests would obviously be impossible, and the same are necessary for valid diagnosis by a psychiatrist.

Petitioner's reference at page 47 of his Brief in footnote 54, that ". . . unless the inmate periodically returns to a staff member and personally informs him that the inmate refuses to answer questions, the inmate is disciplined," is a misstatement of what happens. Petitioner is not disciplined for failing to take the examination, but if he refuses to personally see the examiner, he may be disciplined for failure to obey an order of an institutional staff member. *Sas, supra*, 295 F. Supp. at 410-411; (J.A. 4, 217-223).

Further, Petitioner states at page 48 of his Brief in footnote 56 that *Sas v. Maryland, supra*, 334 F. 2d 506, found that the primary purpose of Article 31B was not to provide treatment. That case was decided on June 16, 1964. Although early writings indicated that there was some understaffing at Patuxent, the testimony before the courts in *Murel, supra*, showed that Patuxent is now adequately staffed (J.A. Md., 814-840, 884-891); (J.A. 4, 212).

The findings of the courts subsequent to *Sas, supra*, have held that therapy is available to all at Patuxent Institution and that confinement without treatment would be patently unconstitutional. *Director v. Daniels, supra*, 243 Md. at 60-61; *Sas, supra*, 295 F. Supp. at 416; *Tippett, supra*, 436 F. 2d at 1155; (J.A. 4, 293).[4]

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[4] "(Judge Powers) From what you know of it [treatment at Patuxent Institution], do you approve or disapprove?

"(The Witness) I heartily approve. I wish we had an institution like this in our state. We have a diagnostic center, but after we have made the diagnosis we haven't got a place like this for treat-

SUMMARY OF ARGUMENT

With craftsmanship and care, Article 31B (Defective Delinquents) was established with the goals of avoiding both the harsh over-inclusiveness of those habitual criminal statutes by which non-dangerous prior offenders are subject to its provisions and the rigid under-inclusiveness of such statutes by which dangerous first offenders are exempt from its provisions and hence immune from the State's interest in curing recidivism by treatment.

To implement this design, a careful process of examination and evaluation of referred individuals who had been tried, convicted, and sentenced for specified crimes was established. The linch-pin of this process is the input from the inmate in the form of personal history, social history, psychological tests, his version of the offense in question, and psychiatric interviewing.

On eighteen separate occasions Petitioner McNeil has refused to allow psychiatric examination, psychological testing, or the taking of his social history, thus starving the diagnostic process of cooperative input. Why does he refuse?

The claim of a risk of criminal incrimination ignores the legislative, judicial, and administrative safeguards which have been established to protect him from future criminal incrimination. In seventeen years of operation,

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ment. I mean the patient's course of life will depend upon his response to treatment. We do not have a place like that, I wish we did" (J.A. Md., 288-289).

This evaluation of Patuxent's treatment program came from Dr. Karl A. Menninger, Chief of Staff of the Menninger Foundation; Member of the National Advisory Council of the American Civil Liberties Union, advisor to the Director of the Kansas State Hospital and Penal Institutions; advisory member for the model sentencing act; psychiatric advisor to the United States Air Force and Strategic Air Command. *Director v. Daniels, supra,* at 67.

there has been no concrete instance known by Respondent where Patuxent records have found their way into either criminal investigation or adjudication.

The claim of a risk of civil commitment based upon a diagnosis made from patient input ignores the twin-fold necessity confronting the State of Maryland: (1) the necessity to commit and treat dangerous anti-social individuals, and (2) the necessity to diagnose in order to treat. Why does the State of Maryland insist upon cooperatively given input as a basis for its diagnosis?

There is a superabundant basis in fact affirming the State's carefully considered conclusion that without inmate cooperation in its varied forms, no valid diagnosis is possible, and that other means of diagnosis and/or commitment are less fair and less effective.

The State's right to compel cooperation is based upon the State's need for diagnosis. If the State has a right, it cannot be without a means of vindicating it. The means chosen — an indeterminate stay in the diagnostic area of Patuxent until cooperation is obtained — is a necessary and proper means to defeat the desire of undiagnosed defective delinquents to evade treatment by sitting out their sentences.

Thus, although the Maryland statute recognizes and protects the right of those referred for examination to challenge their status as defective delinquents before that status is finalized, a full-scale adversary judicial hearing prior to a referral for examination would be vexatious and purposeless, since the hearing would be to determine the probability of a fact (defective delinquency) unascertainable without the examination.

A balancing of an inmate's rights and the State's compelling interests are not to be seen as a "simplicity" (see

Petitioner's Brief, p. 15), but rather should be subjected to a concerned diagnosis by this Court.

ARGUMENT

I.

AN INDIVIDUAL TRIED, CONVICTED, AND SENTENCED FOR A PARTICULAR CATEGORY OF CRIMES AND THEN REFERRED BY COURT ORDER TO PATUXENT FOR EVALUATION IS NOT THEREBY DENIED DUE PROCESS NOR DOES HE POSSESS A RIGHT TO REMAIN SILENT OR A RIGHT TO REFUSE TO COOPERATE WITH PROFESSIONAL STAFF SEEKING AN EVALUATION OF HIS MENTAL CONDITION.

In *Murel v. Baltimore City Criminal Court*,[5] No. 70-5276, argued in this Court on March 28-29, 1972, the situation of individuals civilly committed to Patuxent Institution was presented and considered. In *Murel*, the bulk of argument was directed at the procedure used to determine the defective delinquency of a given patient (*see Murel* Brief for Petitioner's Arguments II, IV, V, VI, VII, VIII, IX, X, XII). In the present case, Petitioner is one of approximately seventy inmates at Patuxent Institution who have, by their non-cooperation, not allowed the fact-finding procedures attacked in *Murel* to operate at all.

In *Director v. Daniels*, 243 Md. 16, 43, 221 A. 2d 397 (1966), *cert. denied sub nom.; Avey v. Boslow*, 385 U.S. 940 (1966), the Court of Appeals of Maryland stated:

> "The procedural requirements of the Act include these safeguards to the defendant:
>
> "1. He must be convicted and sentenced in a Maryland Court for a crime.
>
> "2. The crime must be of a particular category: (a) a felony or (b) a misdemeanor punishable by imprisonment in the penitentiary or (c) one of vio-

[5] *Sas v. Maryland*, 295 F. Supp. 389 (D. Md. 1969), *aff'd sub nom.; Tippett v. Maryland*, 436 F. 2d 1153 (4th Cir.), *cert. granted sub nom.; Murel v. Baltimore City Criminal Court*, 404 U.S. 999 (1971).

lence, or (d) a sex crime involving physical force, disparity of age, or of an uncontrolled or repetitive nature, of (e) two or more convictions for offenses punishable by imprisonment in a criminal court of this State.

"3. There must be a request for examination by: (a) the Department of Correction, (b) the State's Attorney's office, (c) such person himself, (d) his attorney, or (e) the Court.

"4. The Court must order the examination.

"5. A copy of the order for examination must be served on the person to be examined.

"6. The person must still be confined.

"7. The examination must be made by at least three persons, one of whom must be (a) a medical physician, one a (b) psychiatrist and one a (c) psychologist.

"8. A majority of the examiners must conclude that the person is a defective delinquent.

"9. The person is entitled on request to be examined by a private psychiatrist of his own choice at the expense of the State unless he, himself, has asked for the original examination.

"10. The person must, after the examination with an affirmative result, be brought before the Court and advised of the substance of the report and the pendency of the hearing.

"11. He is entitled to counsel of his choice, or to competent counsel appointed by the Court.

"12. Counsel has access to all records, reports and papers of the institution relating to the person and to all papers in the possession of the Court bearing on his case.

"13. The person has a choice of a court or jury trial.

"14. He may make application for leave to appeal from the order holding him to be a defective delinquent, although such appeal does not lie as a matter of right.

"He, in addition to the specific statutory safeguards, has full opportunity to summon witnesses and to present evidence. Also, he has available to him all discovery procedure permitted under the Maryland Rules in civil cases, which is much broader than in criminal cases, including the taking of depositions, the use of interrogatories and demands for admission of facts.

"'. . . . An examination of the trial and hearing provisions of the Act can leave no doubt that it places around the accused more procedural safeguards than any of the Acts of a similar nature which have been upheld by the Courts against this attack.' *Sas v. Maryland, supra.* Also see *Minnesota, ex rel. Pearson v. Probate Court, supra* and *Buck v. Bell, supra.*" *Director v. Daniels, supra*, 243 Md. at 43-44.

For purposes of comparison, Petitioner Murel[6] completed all fourteen steps listed above, but Petitioner McNeil has not allowed step seven to be taken due to his refusal to be examined.

A. The Absence of an Adversary Judicial Hearing Prior to Referral to Patuxent for Examination Does Not Deny Due Process.

1. *There is no constitutional requirement for an adversary judicial hearing before referral to Patuxent for examination.*

Society has an overriding interest in protecting itself from the violent mentally ill. *Greenwood v. United States*, 350 U.S. 366 (1956). The validity of 18 U.S.C.A. §§ 4244-4248, which deals with the care and custody of insane persons charged with or convicted of offenses against the

[6] Petitioner Murel, in addition to challenging the fact-finding process, also challenged: (1) the definition of defective delinquency (*cf.* Argument I); (2) the treatment available at Patuxent Institution (*cf.* Arguments III and V); (3) the review and reevaluation process; and (4) the indeterminate sentence (*cf.* Argument II).

United States, was challenged in *Greenwood*. Mr. Justice Frankfurter, speaking for a unanimous Court, held 18 U.S.C.A. §§ 4244-4248 to be constitutional, after giving a resume of the salient features of the statute. Greenwood had not been brought to trial because of his mental condition, which was described as psychotic and incompetent. It was subsequently determined that the prognosis for his recovery was poor and that indefinite hospitalization to ensure his safety and that of society was in order. The petitioner was committed to the care of the Attorney General until his sanity should be restored or his mental condition so improved that if released he would not endanger the safety of the officers, property, or other interests of the United States.

The Court observed that the government's interest in protecting society as well as the prisoner was paramount and that constitutionally the government had the right and the power to have a prisoner whose term of imprisonment was about to expire indefinitely committed to an appropriate institution until his sanity or mental competence was restored and he was no longer a danger to the officers, property, or other interests of the United States. That right also applied in the case of Greenwood, who had not been brought to trial. As the Court said in *Greenwood, supra*, at 375-76:

> "The fact that at present there may be little likelihood of recovery does not defeat federal power to make this initial commitment of the petitioner. We cannot say that federal authority to prosecute has now been irretrievably frustrated. The record shows that two court-appointed psychiatrists found petitioner sane and competent for trial. While the District Court did not accept their conclusion, their testimony illustrates the uncertainty of diagnosis in this field and

> the tentativeness of professional judgment. The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment, even about a situation as unpromising as petitioner's, at least as indicated by the report of the United States Medical Center at Springfield. Certainly, denial of constitutional power of commitment to Congress in dealing with a situation like this ought not to rest on dogmatic adherence to one view or another on controversial psychiatric issues."

The thrust of this Court's decision in Greenwood is that since greater precision in the diagnosis of the mentally ill would be achieved with time, the law must not assume a dogmatic position on the validity of psychiatric theories, and that society had to rely on the learning of psychiatry in protecting it against those individuals who posed a danger to themselves and it. In subsequent decisions, there has been much judicial comment on society's need to protect itself against the sexual psychopath, the insane, or the mentally incompetent. *See e.g., Carter v. United States,* 283 F. 2d 200 (D.C. Cir. 1960). Indeed, under the federal scheme it has been held irrelevant that a person is committed as a danger to society before trial and remains committed beyond the possible maximum sentence of which he is charged. *Carmen v. Settle,* 209 F. Supp. 64 (W.D. Mo. 1962).

The impact of these understandings in the area of the defective delinquent and its ilk is that the formalistic confines of sentence and punishment are transcended, the frame of reference being the time necessary for adequate treatment, not the length of a sentence.

In *Baxstrom v. Herold,* 383 U.S. 107 (1966), this Court required that the petitioner be given the right to the same

procedure as all others civilly committed under § 74 of the New York Mental Hygiene Law, which provided that civilly committed individuals could *seek* review de novo on the question of their sanity. The question of review prior to initial commitment was not raised. However, in this Court's silent approval of the New York civil commitment procedure, there is a basis for concluding that no adversary judicial hearing prior to evaluation need be given.[7]

In *Lynch v. Overholser*, 369 U.S. 705, 711 (1962), this Court described the District of Columbia statute, stating, without disapproval:

> "Thus, a civil commitment must commence with the filing of a verified petition and supporting affidavits. DC Code § 21-310. This is followed by a preliminary examination by the staff of Saint Elizabeths Hospital, a hearing before the Commission on Mental Health, and then another hearing in the District Court, which must be before a jury if the person being committed demands one. DC Code § 21-311."

In *Caritativo v. California* U.S. 549 (1958), this Court held that due process is not denied when a state leaves to its governor to determine ex parte the sanity of a man condemned to death, affirming *Solesbee v. Balkcom*, 339 U.S. 9, 12 (1950), which relied upon the "inherent differences between trial procedures and post conviction procedures such as sentencing." *See also Williams v. New*

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[7] In *Humphrey v. Cady*, ___ U.S. ___, 40 U.S.L.W. 4324 (Mar. 22, 1972), this Court found the need for habeas corpus evidentiary hearings on the question of petitioner's commitment under the Wisconsin Sex Crime Act, holding his claims not frivolous in light of *Baxstrom v. Herold, supra*. Petitioner's other cited cases (Petitioner's Brief, pp. 16-23), almost uniformly deal with the need for a hearing before the commitment of an individual is finalized and do not reach the issue here present, the need for a hearing before a referral for examination.

York, 337 U.S. 241 (1949); *Phyle v. Duffy*, 334 U.S. 431 (1948); *Nobles v. Georgia*, 168 U.S. 398, 405 (1897).

The additional restraints, if any, upon Petitioner's liberty are certainly no greater than an original arrest and incarceration or a civil insanity commitment,[8] neither of which requires an adversary judicial hearing prior to transfer. The only way that this restraint becomes significant is after the unnecessary non-cooperation by Petitioner. *Cf. People v. Lipscomb*, 263 Cal. App. 2d 59, 69 Cal. Rptr. 127 (1968).

In evaluating whether due process requires an adversary judicial hearing before a given decision, it is helpful to look at (a) the nature of the injury to the petitioner by the absence of a "trial-type" hearing, and (b) the governmental interest served by avoiding a "trial-type" hearing. *See Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886 (1961).

This Court in *Jennings v. Mahoney*, ... U.S. ....., 30 L. Ed. 2d 146 (1971), refused to strike down a statutory scheme whereby a state official, solely on the basis of accident reports and without affording the motorist a hearing on the issue of fault, could revoke his license, and noted:

> "The District Court in fact afforded this appellant such procedural due process. That court stayed the Director's suspension order pending completion of judicial review, and conducted a hearing at which appellant was afforded the opportunity to present evidence and cross-examine witnesses. Both appellant and the Director testified at that hearing. The testimony of the investigating police officer would also have been heard except that appellant's service of a

[8] It should be unnecessary to mention that the State of Maryland by means of Patuxent Institution has an obvious interest in centralizing diagnostic facilities in one place and bringing inmates to the place of referral rather than taking the diagnostic staff to the various correctional institutions.

subpoena upon him to appear was not timely under the applicable court rules." 30 L. Ed. 2d at 148.

The *Jennings* court dealt with the serious change of status by administrative action from driver to non-driver. In the instant case, the only change in status is a change in the *place* of incarceration.

2. *A pre-evaluation hearing prior to referral of an individual to Patuxent would be vexatious and purposeless.*

Where or not a hearing prior to referral of an inmate to Patuxent for evaluation is a due process requirement involves also an understanding of "the precise nature of the governmental function involved as well as the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers v. McElroy, supra.*

The governmental interest involved in avoiding an adversary judicial hearing before a referral is fairly apparent. In the present case, the information which prompted the trial judge's order of referral came from two sources: (1) Petitioner's trial resulting in a verdict of guilt on the charge of attempted rape and assault, and (2) the report of the Medical Department of the Supreme Bench of Baltimore City.

As to evidence adduced at trial, there is no reason for an additional adversary judicial hearing which would litigate the same facts found at trial. In fact, in many — if not most — referrals, the only evidence before the trial judge is the testimony as to guilt and the accused's past record, both sources of evidence having been the result of full-scale criminal trials.

As to the medical report, this Court has held that the trial judge at sentence determination is entitled to receive "additional out-of-court information to assist him" without having that information filtered through the advocacy process. *Williams v. New York, supra* at 252. To hold other-

wise would be to immobilize the dispositional process[9] without any assurance of greater fairness.

The probable cause requirement for a Patuxent referral is very similar in function to the probable cause requirement for a search or arrest warrant, neither of which requires a prior adversary hearing. In each case, speed and dispatch are necessary; the Patuxent referral requires dispatch because of the probable danger involved in even allowing the particular inmate to be at large in the general prison community, let alone the general community. In each case, common sense rather than fully-litigated factual findings are involved; the Patuxent referral is a form of lay recognition of the need for expert advice. *See Greenwood v. United States, supra;* cf. *McGautha v. California*, 402 U.S. 183 (1971) (recognizing that vague standards in discretionary dispositional processes after a full-scale criminal trial are not constitutionally defective).

On the basis of a review of the precise nature of the Patuxent referral, it is submitted that requiring an adversary judicial hearing to determine the existence of probable cause as to defective delinquency would be purposeless and vexatious.

B. The Privilege Against Self-Incrimination Does Not Apply to Non-Testimonial Disclosures at a Psychiatric Examination Pursuant to a Civil Proceeding Where There Is No Risk of Criminal Incrimination.

1. *Personal disclosures as to one's mental condition are not "testimony" as the term has been historically and is presently used.*

Petitioner's contention that an individual referred to Patuxent, in being required to cooperate, has his privilege

[9] Almost uniformly the cases cited by Petitioner deal with the need for a hearing before *finalization* of commitment, a proposition recognized in §8 of Art. 31B.

against self-incrimination abridged is implicitly rejected in the line of cases, which hold that a defendant need not be warned of his *Miranda* [*v. Arizona*, 384 U.S. 436 (1966)] rights prior to being examined by a government psychiatrist, *Ramer v. United States*, 411 F. 2d 30 (9th Cir. 1969), *cert. denied*, 396 U.S. 965 (1969). *See also State v. Risden*, 106 N.J. Super. 226, 254 A. 2d 812 (1969); *Franklin v. State*, 114 Ga. App. 304, 151 S.E. 2d 191 (1966) (medical examination).

In *United States v. Baird*, 414 F. 2d 700 (2d Cir. 1969), the defendant produced the testimony of a psychiatrist to the effect that he suffered from a combination of circulatory impairment in the brain with cerebral atrophy, reactive depression. The psychiatrist concluded that the defendant lacked substantial capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the income tax laws. On the Government's motion, the trial court ordered the defendant "to cooperate fully with the examining psychiatrist and to answer each and every question put to him by the psychiatrist." The trial court added that "there is no privilege on the part of this defendant to decline to answer any question put to him by this examining psychiatrist." The trial court specifically limited the government psychiatrist's testimony to the issue of criminal responsibility and would not permit the repetition of anything bearing on the issue of guilt or innocence. On appeal, the Government relied on the so-called "pro tanto waiver" by the defendant of his Fifth Amendment rights, relying on *Pope v. United States*, 372 F. 2d 710, 721 (8th Cir. 1967) (en banc), *vacated and remanded on other grounds*, 392 U.S. 651 (1968); *Alexander v. United States*, 380 F. 2d 33, 39 (8th Cir. 1967); and *United States v. Albright*, 388 F. 2d 719, 722-24 (4th Cir. 1968). After distinguishing both *Pope* and *Alexander*, the Second Circuit said:

"We conclude, however, that where under such circumstances the defendant puts in evidence the opinion testimony of his expert, the Government has the right to have its expert examine the accused and to put in evidence his opinion testimony in rebuttal, and that the exercise of such right by the Government does not infringe the defendant's right against self-incrimination.

"These issues relating to the defense of insanity were before the Supreme Court of New Jersey in State v. Whitlow, 45 N.J. 3, 210 A. 2d 763 (1965). It said,

> " 'It is obvious, even to the layman, that in all probability a psychiatrist would require more than a mere physical examination of a defendant in order to reach a conclusion of his sanity or insanity. The very nature of the psychiatric study would seem to call for utterances or answers through conversation with the alleged incompetent. The psychiatric interview is the basic diagnostic tool.'
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> * * * * * *
>
> " 'There seems to be a tendency elsewhere in insanity cases to allow the defense psychiatrist to recount the full history obtained from the defendant regardless of its hearsay or self-serving quality, so long as the doctor regards it as essential to the formulation of his expert opinion. If he so regards the history, the test of admissibility is satisfied. The thesis is that such conversations with and statements by the defendant, whether or not they relate to the crime itself, are verbal acts; circumstantial evidence for or against the claim of insanity. They do not come in as evidence of the truth of the facts asserted but rather, and only, as part of the means employed by the doctor in testing the accused's rationality, mental organization and coherence. They are object-like factors used to ascertain mental abnormality or the reverse.'
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> 210 A. 2d 769-771.

"The statements which the defendant makes to the psychiatrist may be as vital for diagnosis as an x-ray or a blood test may be to a physician in another context; this was the theory of admissibility upon which appellant relied in having his expert witnesses recount otherwise inadmissible self-service, hearsay statements; and, even though they are verbal, they may be considered as 'real or physical evidence' rather than as 'communication' or 'testimony' within the meaning of Schmerber v. California, 384 U.S. 757, 763-764, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) in which the Supreme Court said:

> " 'It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746. On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.' (Footnote omitted.)

Schmerber did not make the communications — real evidence dichotomy absolute. While noting that 'this distinction is a helpful framework for analysis,' the Court foresaw that '[T]here will be many cases in which such a distinction is not readily drawn.' " *Baird, supra* at 708-09.

The Court also held in *Baird*, at 710, relying on *United States v. Driscoll*, 399 F. 2d 135, 139 (2d Cir. 1968); *Pope v.*

United States, supra; Alexander v. United States, supra; and *United States v. Albright, supra*, that the Federal District Court has the inherent power to order a psychiatric examination.[10]

In *Tippett v. Maryland*, 436 F. 2d 1153 (4th Cir. 1971), Judge Sobeloff in his concurring-in-part, dissenting-in-part opinion said:

> "The reluctance of Patuxent inmates to respond to the staff's probing is understandable. Admissions made concerning mental state and past criminal behavior provide significant evidence for the state to use at the judicial hearing on defective delinquency. The petitioners maintain that they have an absolute right to silence, and cannot be forced to reveal information which may be used against them. But determining defective delinquency involves essentially an inquiry into the state of the inmate's mind. Denied direct access, the state psychiatrists would be relegated to secondhand information in arriving at a diagnosis. In United States v. Albright, 388 F. 2d

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[10] *Matthews v. Hardy*, 420 F. 2d 607 (D.C. Cir., 1969), *cert. denied*, 90 S. Ct. 1231 (1970), cited by Petitioner proves too much. *Matthews* stands for the proposition that after a mental examination by a psychiatrist the patient under D.C. Code §24-302 (1967) must be given a judicial hearing. This coincides with the provisions of Art. 31B §8 requiring a commitment hearing following examination. Unanswered by *Matthews* is the refusal of an individual in Matthews's position to submit to the initial mental examination (*compare* D.C. Code §22-3506 wherein a patient being examined as a possible sexual psychopath is required to answer questions asked by the psychiatrists under penalty of contempt of court). *See also* Fla. Stat. Ann. 917.17 (Supp. 1958), Ind. Ann. Stat. 9-3404 (now repealed) which contain language similar to that within Narcotics Civil Commitment Statute, 42 U.S.C. 3413 ("should he refuse to cooperate . . . he may be committed for additional confinement . . ."). *Compare* 18 U.S.C. 4241 (dealing with insanity occurring during confinement) where Respondent has uncovered no case where the Bureau of Prisons has been faced with a potentially mentally ill prisoner who refuses to cooperate in his psychiatric examination even with the possibility of indeterminate civil commitment.

719 (4th Cir. 1968), this court emphasized the necessity for a government psychiatric examination where the mental condition of a criminal defendant was in issue. It was reasoned that the defendant had waived his right to silence by raising the insanity issue as a defense, but the underlying thrust of the *Albright* opinion was the recognition that a reliable inquiry into the defendant's mental state is possible only with his active cooperation.

"With the continuing reservation that this issue is open to further consideration, I agree, for the present, that the right against self-incrimination cannot be rigidly applied in Patuxent proceeding. I rest, however, not on the asserted ground that the Act is 'civil' but that, because of the unusual nature of the necessary inquiries, the legitimate objectives of the legislation would be frustrated were inmates permitted to refuse cooperation. Granting the inmate the right to silence would in many instances thwart the personal examinations and interviews considered indispensable in determining whether the prisoner is or is not a defective delinquent." (Footnotes omitted.) 436 F. 2d at 1161-62.

It is now firmly established that "non-testimonial" evidence does not fall within the purview of the Fifth Amendment.

In *Breithaupt v. Abram*, 352 U.S. 432 (1957),[11] the petitioner claimed, *inter alia*, that his right against self-incrimination was violated when blood was extracted from him while he was unconscious. The blood sample was found to contain approximately .17 percent alcohol and the finding was introduced into evidence. The Court bypassed the application of Fourth and Fifth Amendment grounds raised. This Court decided the case by distinguish-

[11] *Breithaupt* predated *Mapp v. Ohio*, 367 U.S. 643 (1961).

ing it from *Rochin v. California*, 342 U.S. 165 (1952). However, the majority, through Mr. Justice Clark, said:

> "The test upheld here is not attacked on the ground of any basic deficiency or of injudicious application, but admittedly is a scientifically accurate method of detecting alcoholic content in the blood, thus furnishing an exact measure upon which to base a decision as to intoxication. Modern community living requires modern scientific methods of crime detection lest the public go unprotected. The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield. The States, through safety measures, modern scientific methods, and strict enforcement of traffic laws, are using all reasonable means to make automobile driving less dangerous.
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> "As against the right of an individual that his person be held inviolable, even against so slight an intrusion as is involved in applying a blood test of the kind to which millions of Americans submit as a matter of course nearly every day, must be set the interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road. And the more so since the test likewise may establish innocence, thus affording protection against the treachery of judgment based on one or more of the senses. Furthermore, since our criminal law is to no small extent justified by the assumption of deterrence, the individual's right to immunity from such invasion of the body as is involved in a property safeguarded blood test is far outweighed by the value of its deterrent effect due to public realization that the issue of driving while under the influence of alcohol can often by this method be taken out of the confusion of conflicting contentions." (Footnotes omitted.) 352 U.S. at 439-40.

The Respondent herein likewise contends that the examination to which Petitioner is required to submit is equally

as scientific and essential for the safety of the public as is a valid means of detecting blood alcohol in a drunken driver.

In *California v. Byers*, 402 U.S. 424 (1971), a case involving the requirement under California law that the driver of a motor vehicle involved in an accident stop and give his name and address, the respondent claimed that the divulgence of such information violated his Fifth Amendment right against self-incrimination. In his Opinion, Mr. Chief Justice Burger said:

> "The act of stopping is no more testimonial — indeed less so in some respects — than requiring a person in custody to stand or walk in a police lineup, to speak prescribed words, to give samples of handwriting, fingerprints or blood. United States v. Wade, 388 U.S. 218, 221-223, 18 L. Ed. 2d 1149, 1153-1155, 87 S. Ct. 1926 (1967); Schmerber v. California, 384 U.S. 757, 764 & n.8, 16 L. Ed. 2d 908, 916, 86 S. Ct. 1826 (1968); 8 Wigmore, Evidence § 2265, at 386-400 (McNaughton rev. 1961). Disclosure of name and address is an essentially neutral act. Whatever the collateral consequences of disclosing name and address, the statutory purpose is to implement the state police power to regulate use of motor vehicles." 402 U.S. at 431-32.

As mentioned in the foregoing discussion of society's need to be protected from the individual who poses a danger by being a defective delinquent, one is forced to reason that the logical thrust of *Byers* compels the view that the Fifth Amendment does not apply to examinations inquiring into a patient's mental state.

In 8 Wigmore, *Evidence*, § 2265, pp. 386-400 (McNaughton rev. 1961), the following was stated:

> *"Bodily condition (clothes, features, fingerprints, medical examination, etc.).* If an accused person were

to refuse to be removed from the jail to the courtroom for trial, claiming that he was privileged not to expose his features to the witnesses for identification, it is not difficult to conceive the judicial reception which would be given to such a claim. And yet no less a claim is the logical consequence of the argument that has been frequently offered and occasionally sanctioned in applying the privilege to proof of the bodily features of the accused.

"The limit of the privilege should be plain. From the general principle (§2263 *supra*) it results that an inspection of the bodily features by the tribunal or by witnesses does not violate the privilege because it does not call upon the accused as a witness — i.e., upon his testimonial responsibility. That he may in such cases be required sometimes to exercise muscular action — as when he is required to take off his shoes or roll up his sleeve — is immaterial, unless all bodily action were synonymous with testimonial utterance; for, as already observed (§2263 *supra*), not compulsion alone is the component idea of the privilege, but testimonial compulsion. What is obtained from the accused by such action is not testimony about his body, but his body itself (§1150 *supra*). Unless some attempt is made to secure a communication — written, oral or otherwise — upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one. Moreover, a practical consideration applies to this class of evidence. When the person's body, its marks and traits, itself is in issue, there is ordinarily no other or better evidence available for the prosecutor.

"Hence, the public interest in obtaining the evidence is usually sufficient to outweigh by a clear margin the private interests sacrificed in the process.

"Both principle and practical good sense forbid any larger interpretation of the privilege in this application.

"A great variety of concrete illustrations have been ruled upon. The following are the eleven principal categories. As for the first six, it should be easy to rule that they are not covered by the privilege. Cooperation of the person may or may not be demanded, but in any event exactly the same evidence could be obtained with no more than access to the person's passive body. And in no sense is the person required to disclose any knowledge.

". . . .

"(10) Requiring a suspect to submit to an examination for sanity."[12] (Footnote omitted.)

This view has been incorporated into the Uniform Rules of Evidence:

"*Uniform Rule of Evidence* 23(3) ('An accused in a criminal action has no privilege to refuse, when ordered by the judge, to submit his body to examination or to do any act in the presence of the judge or the trier of the fact, except to refuse to testify'); id. 25(b) ('no person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics, or his physical or mental condition'); id. 25(c) ('no person has the privilege to refuse to furnish or permit the taking of samples of body fluids or substances for analysis'). These three rules are substantially the same as *Model Code of Evidence* Rules 201(2), 205(a) and 205(b) (1912), respectively."

Classifying a given disclosure, act, or utterance as "nontestimonial" has certain effects here pertinent. For example, it is now widely established that a defendant may be compelled, under the threat of being held in contempt of court, to submit to being placed in a lineup. *United*

[12] Wigmore sets out eleven categories of bodily conditions which are "non-testimonial," sanity examination being the tenth. Also set forth in the supplement to Wigmore is the quotation which follows from the *Uniform Rule of Evidence*.

States v. Hammond, 419 F. 2d 166 (4th Cir. 1969), *cert. denied*, 397 U.S. 1068 (1970).

Further support for the proposition that compulsory mental examinations do not violate the right against self-incrimination is found in cases dealing with the implementation of sexual psychopathy statutes. In the leading case, *People v. English*, 31 Ill. 2d 301, 201 N.E. 2d 455 (1964), it was held that refusal to answer questions posed by psychiatrists could result in a finding of wilful contempt. The Illinois court held that due to the nature of the proceeding, a defendant under the Sexually Dangerous Persons Act (Ill. Rev. Stat. 1963, Chap. 38, par. 105-1.01 to 105-12) could be compelled to answer the questions asked by the examining psychiatrists.[13] The Court in *English*, due to peculiarities present under Illinois law, held, however, that a defendant in such a proceeding could refuse to answer specific questions which would disclose criminal conduct inasmuch as those statements could be used in subsequent criminal prosecutions. The Court indicated that if the statements could not be later used to incriminate the defendant, he could be forced to answer questions concerning criminal conduct. As the Respondent stated in its brief in *Murel v. Baltimore City Criminal Court, supra*, it will not use any statement made by a patient at Patuxent against him in any subsequent criminal proceeding.[14] The

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[13] Commitment for contempt of court based on a failure of a party to obey a valid order of court is civil in nature. Under such a situation the party in contempt may remain in prison until the order is complied with. As the court said in *In re Nevitt*, 117 F. 448, 451 (8th Cir. 1902) (quoted with approval in *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442 (1911)), "he carries the keys of his prison in his own pocket." *See also Zicarelli v. New Jersey State Com'n of Investigation*, 55 N.J. 249, 261 A. 2d 129 (1970), *cert. granted on other points*, 401 U.S. 933 (1971).

[14] No disclsoure by a patient at Patuxent Institution has been used in a subsequent criminal action in the Institution's seventeen-year existence (J.A. 4, 204.) *Murel v. Baltimore City Criminal Court, supra*, Brief of Respondents, p. 52.

problem posed to the Illinois court in *English*, therefore, does not exist in Maryland and full disclosure might be compelled in Maryland under the rationale of *English*.

In *State ex rel. Haskett v. Marion County Criminal Court*, 250 Ind. 229, 234 N.E. 2d 636 (1968), *cert. denied*, 393 U.S. 888 (1968), the Supreme Court of Indiana rejected the contention that compulsory examination of an accused in a sexual psychopathy action by two physicians violated the privilege against self-incrimination. Under Indiana statute, the accused was protected from the use of any of his statements in any future criminal proceeding against him. *See also Sevigny v. Burns*, 108 N.H. 95, 227 A. 2d 775 (1967); *State v. Madary*, 178 Neb. 383, 133 N.W. 2d 583 (1965); *Iowa ex rel. Fulton v. Scheetz*, 166 N.W. 2d 874 (1969).

The view of the courts on the nature and the complexities of the examination undertaken to determine mental illness and on criminal insanity has undergone a significant change in this century. Many of the earlier cases hold that no violation of the privilege against self-incrimination occurs because there was either no compulsion or the examination could be made without the defendant uttering a word. *People v. Krauser*, 315 Ill. 485, 146 N.E. 593 (1925); *People v. Chrisoulas*, 367 Ill. 85, 10 N.E. 2d 382 (1937); *Noelke v. State*, 214 Ind. 427, 15 N.E. 2d 950 (1938); *People v. Furlong*, 187 N.Y. 198, 79 N.E. 978 (1907); *People v. Truck*, 170 N.Y. 203, 63 N.E. 281 (1902); *Commonwealth v. DiStasio*, 294 Mass. 273, 1 N.E. 2d 189 (1936); *Commonwealth v. Butler*, 405 Pa. 36, 173 A. 2d 468 (1961), *cert. denied*, 368 U.S. 972, *rehearing denied*, 368 U.S. 972; *Commonwealth v. Musto*, 348 Pa. 300, 35 A. 2d 307 (1944); *State v. Petty*, 32 Nev. 384, 108 P. 934 (1910); *People v. Bundy*, 168 Cal. 777, 145 P. 537 (1914); *People v. Strong*, 114 Cal. App. 522, 300 P. 84 (1931); *State v. Riggs*, 16

Wyo. 1, 198 P. 2d 349 (1956); *State v. Eastwood*, 73 Vt. 205, 50 A. 1077 (1901); *Wehenkel v. State*, 116 Neb. 493, 218 N.W. 137 (1928); *State v. Genna*, 163 La. 701, 112 So. 655 (1927); *Blocker v. State*, 92 Fla. 878, 110 So. 547 (1926); *Early v. Tinsley*, 286 F. 2d 1 (10th Cir. 1960).

By contrast, the more modern view, cognizant of the need for the personal interview, holds that the interview is scientific in nature and therefore "non-testimonial." *United States v. Albright, supra; United States v. Baird, supra; State v. Whitlow*, 45 N.J. 3, 210 A. 2d 763 (1965).

2. *There is no risk of incrimination flowing from the Patuxent diagnostic examination.*

In *California v. Byers, supra*, this Court found the "mere possibility of incrimination insufficient to defeat the strong policies in favor of disclosure." In *United States v. Freed*, 401 U.S. 601 (1971), this Court found persuasive the fact that gun registration data was not made available to prosecutors.

Taking Petitioner's arguments in their most favorable light, nothing greater than a mere possibility of incrimination has been shown. In fact, a comparison between *Byers* and *Freed* and the present situation would show, Respondent submits, that the actual danger of criminal prosecution is far less in the present situation. *California v. Byers, supra*, dealt with a driver's compelled need to stop and identify himself; if he were drunk, drugged; under-aged, or joy-riding, his risk of criminal prosecution is extremely great. *United States v. Freed, supra*, dealt with a revamped gun registration statute which in its old form had been held unconstitutional. Anyone who takes the position that a gun registration statute carries with it no risk of later incrimination should follow with interest the trial of Angela Davis now in progress. In both *Byers*

and *Freed* the individuals subject to the possibility of incrimination had not been previously criminally tried and convicted; the relevance of this is that the State of Maryland has no compelling desire to gain incriminatory evidence to prosecute individuals already convicted.[15]

Petitioner's reference proves these points. *Avey v. State*, 9 Md. App. 227, 263 A. 2d 609 (1970), involved a pretrial situation where an individual had been referred to Clifton T. Perkins State Hospital for a competency examination, since he raised the issue of insanity. The prosecutor, to prepare for trial on the issue of sanity, requested the records. The Perkins staff *refused* his request unless and until accompanied by a court order, which was procured later. The Court of Special Appeals, in *Avey v. State*, *supra*, found no improper use of the records, particularly as to the issue of guilt or innocence. Nothing could be clearer than the government's need for the results of a competency examination where a defendant raises the insanity plea. *See Greenwood v. United States, supra; Lynch v. Overholser, supra.* This so-called lack of clarity in Art. 35, §13A,[15a] came about solely and only because of the *over*-protectiveness of the psychiatric staff of Clifton T. Perkins State Hospital. If *Avey v. State, supra*, illustrates anything, it is eloquent witness to the difficulty which faces prosecutors in obtaining psychiatric evidence for even a clearly valid use.

As to additional protection, the Maryland courts, in construing Art. 31B, have held that results of these examinations could probably not be introduced without a violation

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[15] Contrast this situation with cases cited by Petitioner (Brief, pp. 33-35) where the desire to prosecute upon the basis of compelled testimony was apparent.

[15a] Maryland's statute establishing a "psychiatrist-patient" privilege, made applicable to Patuxent by subsection (c) thereof.

of *Miranda v. Arizona*, 384 U.S. 436 (1966). *See Wise v. Director*, 1 Md. App. 418, 230 A. 2d 692, *cert. denied sub nom Wise v. Boslow*, 390 U.S. 1030 (1968). In so stating, the Maryland courts have built an additional barrier against incrimination which is not present in other jurisdictions, which have held that the results of psychiatric tests do not fall within the ambit of *Miranda*.[16] *See also Sas v. Maryland*, 295 F. Supp. 389, 413 (D. Md. 1969).

The unique use of *Miranda v. Arizona*, *supra*, as part of Maryland's three-fold protection[17] against criminal incrimination is in large measure, perhaps, the reason why no disclosure by a patient at Patuxent Institution has been used in a subsequent criminal action in the Institution's seventeen-year history. (J.A. 4, 204.)

The inability of Petitioner to point to *any* example where there is a suspicion (let alone probable basis) that Patuxent records have been used in a criminally incriminatory[18] manner is also testimony bearing witness to the proposition that criminal incrimination has not occurred.

C. A Criminally Tried, Convicted, and Sentenced Individual Referred to Patuxent for Examination Who Refuses To Cooperate Is Not Thereby Deprived of Any Constitutional Rights.

The right of the State to use civil commitment of indefinite duration, where necessary, as a necessary and proper means of vindicating legitimate state interests is

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[16] See cases referred to at p. 42, Respondent's Brief.

[17] (1) Statutory (Art. 35, §13A); (2) judicial interpretation (*see Wise v. State*, *supra*); (3) psychiatric staff protectiveness (*see, e.g., Avey v. State*, *supra*).

[18] Respondent submits that the allegation of incrimination flowing from the use of a psychiatric examination to make a psychiatric diagnosis and the use of the psychiatric diagnosis as a basis for psychiatric commitment is unsound on its face. However, this point is answered at Arg. II, Respondent's Brief.

no longer open to question. *See Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940); *Greenwood v. United States, supra; Lynch v. Overholser, supra; cf. Baxstrom v. Herold, supra.* This right of Respondent, as applied to Petitioner and others who choose not to cooperate, does not, in practice, create those hypothecated evils in his list of miscellaneous constitutional violations: (a) equal protection, (b) speedy trial, (c) cruel and unusual punishment, and (d) involuntary servitude.

1. *There is no violation of equal protection flowing from treating uncooperative, undiagnosed possible defective delinquents differently from cooperative diagnosed defective delinquents or the general prison population.*

This argument is comprised of an ornamental citation to the classic case of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), coupled with the admitted assertion that "things would have been different" for Petitioner if he had not been sent to Patuxent. *See* Petitioner's Brief, p. 30.

The central concern of the Equal Protection Clause is avoiding arbitrary, unfair, and purposeless classifications. The question is not whether a classification has been made, but whether or not that classification is a purposeful, proper one. *See Dandridge v. Williams*, 397 U.S. 471 (1970) (Maryland's maximum grant limitation even where some inequities exist is not violative of equal protection clause which is not designed to impose judicial ideas of social policy); *Williamson v. Lee Optical of Okla.*, 348 U.S. 483 (1955); *Flemming v. Nestor*, 363 U.S. 603 (1960).

Factually, there is both a basis in fact and a compelling state interest for drawing the two-fold classification between (1) defective delinquents and the general prison

population, and (2) undiagnosed defective delinquents and diagnosed defective delinquents. As to the reasonableness of the classifications involved, the Maryland Court of Appeals stated:

> "From the voluminous testimony presented in this case we determine that the conclusion of the Fourth Circuit Court in *Sas* is justified when that court decided that the statutory definition was facially constitutional. We say this because the evidence before us clearly shows that there does in fact exist a class or group of persons falling within the definition, constituting a danger to the health and safety of people and who, with the aid of medical expert testimony, after appropriate examination, using recognized medical techniques, are discernible and recognizable by lay persons, including judge or jury. In fact, it is clear from the testimony of nearly all the eminent medical experts specializing in psychiatry testifying in this case that the defective delinquent definition as contained in the statute is no less vague and difficult of understanding or difficult of application to individual persons than are the M'Naghten or Durham rules used in testing criminal responsibility, or the civil insanity rule used in Maryland to determine the need for confinement in a mental hospital of persons suffering from mental disease sufficient to cause them to be 'a danger to themselves or others'. These same eminent medical experts, however, agree that there in fact does exist a medical recognizable group falling clearly within the definition in the Act's definition, and we so find." *Director v. Daniels*, 243 Md. at 33-34.

The Maryland Court of Appeals, in further describing this class, went on to say:

> "Based on the testimony, we fear that without the indeterminate provision in the Act, violence would be done to its basic concepts and purposes, and much of the good sought by this legislation would go for naught. The very qualities making up the nature of an indi-

> vidual at Patuxent, with his warped attitudes and distorted outlook, would dictate to him that he antisocially wait out his allotted time, resisting introspection and any kind of reappraisal of his makeup, and refusing to cooperate in receiving available therapy to any degree that would give promise of his ultimate rehabilitation." *Id.* at 40.

Thus, it is factually apparent that defective delinquents are a recognized class, and that one of the traits of that class is non-cooperativeness where it will appear that non-cooperativeness will serve a selfish and antisocial purpose.

2. *The absence of a civil determination of defective delinquency caused by Petitioner's non-cooperation does not involve a question of "speedy trial."*

Initially, it must be noted that not mere speed, but orderly expedition, is required in the administration of justice. A litigant can therefore not complain of delay and disorder caused by his own conduct. *See Shepherd v. United States*, 163 F. 2d 974 (8th Cir. 1947); *United States v. Graham*, 289 F. 2d 352 (7th Cir. 1961); *United States v. Lustman*, 258 F. 2d 475 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958); *Morland v. United States*, 193 F. 2d 297 (10th Cir. 1951). *Compare People ex rel. Myers v. Briggs*, 46 Ill. 2d 281, 263 N.E. 2d 109 (1970) (mute unable to communicate held entitled to opportunity for trial on pending indictments or release inasmuch as handicap "will not prevent his being subject to trial").[19]

More to the point is the unstated assumption that the right of speedy trial ought to be expanded to cover proceedings not related to the adjudication of guilt, innocence, or criminal penalty. The Sixth Amendment requires only that "[i]n all *criminial* prosecutions, the accused shall en-

[19] Petitioner's Brief, p. 31.

joy the right to a speedy and public trial, ..." (Emphasis supplied.) The distinction is not a matter of mere "labels," since a criminal accused can be subject to increasing prejudice as delay continues but suffers decreasing prejudice if he responds to proper diagnosis and treatment.

Petitioner's position ignores the basic fact that the therapeutic treatment of mental illness may take a considerable period of time. Petitioner harkens for a system of swift, vengeful, criminal justice which merely exacts a speedy penalty in terms of time from the offender; he apparently rejects as valid the notion that society has a greater need for slower rehabilitation of the criminal, be that by conventional means or by the treatment of the defective delinquent.

Thus the use of orderly deliberation and procedures in psychiatric judgments varies considerably from the need for dispatch and speed during guilt adjudication to avoid the evaporation of necessary evidence. *See United States ex rel. Thomas v. Pate*, 351 F. 2d 910 (7th Cir. 1965); *Howard v. United States*, 261 F. 2d 729 (5th Cir. 1958).

3. *A decision not to accede to the wishes of a non-cooperative inmate is not cruel and unusual punishment.*

As usual, Petitioner's cruel-and-unusual-punishment contention is a variation on themes developed elsewhere; the words are differently arranged but the melody is the same.[20] Needless to say, length of sentence per se is not control-

[20] Cruel and unusual punishment because of absence of treatment or judicial findings or possibility of unequal treatment. Compare other arguments: (1) unequal protection because of cruel punishment because not treated or released; (2) no treatment because of absence of judicial finding after hearing, etc., etc.

ling on the question of cruelty. *See* Annotation, "Cruel Punishment — length of sentence," 33 A.L.R. 3d 335 (1970), and cases cited therein. In viewing the nature and purpose of Respondent's action (failure to accede to the wishes of a non-cooperative inmate) rather than its severity, it is apparent that Respondent's actions are not "greatly disproportionate" to Respondent's interests.[21] *See Weems v. United States*, 217 U.S. 349, 371 (1910). *See also Graham v. West Virginia*, 224 U.S. 616 (1912). *Compare Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (execution in a cruel *manner*) and *Robinson v. California*, 370 U.S. 660 (1962) (punishment where no "*irregular* behavior").

Only by presuming — contrary to fact — cruelty, unusualness, and punishment is Petitioner able to allege cruel and unusual punishment.[22]

4. *There is no involuntary servitude at Patuxent.*

The Thirteenth Amendment provides that:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist . . . ."

Outside certain narrow contexts, arguments before this Court relying on the involuntary servitude provision have been summarily rejected. *See United States v. Petrillo*, 332 U.S. 1 (1947); *Butler v. Perry*, 240 U.S. 328 (1916). Also to the question of the lack of involuntary servitude involving insanity commitment after acquittal, *see State ex rel. Thompson v. Snell*, 46 Wash. 327, 89 P. 931 (1907).

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[21] In "Crime Prevention by the Indeterminate Sentence," 128 *American J. of Psychiatry* 3 (1971), Dr. Hodges reported his finding that of those recommended for commitment to Patuxent by the staff but who were not committed, 81% were found to have committed new crimes, a rate significantly greater than those released from Patuxent after treatment (37%).

[22] *Compare* Petitioners' reliance upon *United States ex rel. Schuster v. Herold*, 410 F. 2d 1071 (2d Cir. 1969).

II.

AN INDIVIDUAL TRIED, CONVICTED, AND SENTENCED FOR A PARTICULAR CATEGORY OF CRIMES AND THEN REFERRED BY COURT ORDER TO PATUXENT FOR EVALUATION DOES NOT HAVE HIS CONSTITUTIONAL RIGHTS VIOLATED BY RETAINING HIM UNTIL SUCH TIME AS HE COOPERATES WITH THE PROFESSIONAL STAFF SEEKING TO DETERMINE WHETHER OR NOT HE IS A DEFECTIVE DELINQUENT.

Petitioner posits that (1) a referral to Patuxent for evaluation without an adversary judicial hearing, plus (2) the possibility of indeterminate commitment in the diagnostic stage of commitment, equals (3) an indeterminate commitment without notice or hearing. The fallacy of this equation is the presumption that it is "state action" which leads to the unfortunate result, whereas the facts reveal that it is Petitioner's action — or more accurately, his non-cooperative inaction — which has frustrated his *opportunity* for a hearing.

A. Non-Cooperation Is A Proper Basis For Deferring A Hearing Upon An Issue (Defective Delinquency) Which Requires His Cooperation To Determine.

It is well settled that an otherwise available constitutional right can be forfeited by deliberate misconduct. *See McKart v. United States*, 395 U.S. 185, 194-95 (1969) (judicial review of Selective Service actions jeopardized by "frequent and deliberate flouting of administrative processes" thereby undermining the scheme of decision-making by denying the administrative agency important opportunities to "develop the necessary factual background" and "apply its expertise"); *Illinois v. Allen*, 397 U.S. 337 (1970) (right of accused to be present at trial lost by misconduct); *Fay v. Noia*, 372 U.S. 391 (1963) ("deliberate bypass" of state procedures leading to a bar to federal habeas corpus); *McKissick v. United States*, 398 F. 2d 342 (5th Cir. 1968)

(no double jeopardy where new trial needed because of defendant's misconduct); *Shepherd v. United States, supra* (fugitive from justice losing right to speedy trial).

The premises behind Petitioner's refusal to cooperate are that his non-cooperation is permissible because (a) he possesses the privilege against criminal self-incrimination which can be asserted at the evaluation procedures at Patuxent,[23] and (b) he possesses some type of undefined right to avoid involuntary civil commitment which he can protect by means of non-cooperation.

B. Inmate Cooperation and Disclosure Are Essential To A Proper Diagnosis of Defective Delinquency.

In reviewing statutes requiring disclosure being attacked on self-incrimination grounds, this Court on numerous occasions has affirmed the requiring of disclosures where (a) requiring disclosure was reasonably related to a legitimate non-penal state purpose, and (b) disallowing required disclosure would frustrate that purpose. *See California v. Byers, supra* ("hit and run" statute); *United States v. Freed, supra* (firearms registration); *Shapiro v. United States,* 335 U.S. 1 (1948) (price control records); *United States v. Sullivan,* 274 U.S. 259 (1927) (income tax records). As this Court noted in *Byers* at pp. 427-28, examples of similar disclosures are "legion."

1. *The results of personal diagnostic interviews and inmate cooperation generally are extremely necessary to a full and fair administrative factual recommendation of defective delinquency.*

Whether or not the results of inmate cooperation, chiefly in the form of personal interviews, are necessary to a full, complete, and accurate diagnosis of defective delinquency

[23] *But see* Argument IB, Respondent's Brief.

is a central issue in this case, as shown by an analysis of Petitioner's chain of reasoning.[24]

Aside from the dubious assumption that without the presence of initial inmate trust no treatment can occur,[25] these links in Petitioner's chain of argument are only as strong as the weakest parts which, Respondent would submit, are the factual presuppositions that (1) findings of defective delinquency can be adequately and fairly made without the input (internal feelings, answered questions, test scores, leads) volunteered by a cooperative inmate; and (2) the results of inmate cooperation are, in fact, available and usable by prosecutorial officials.[26]

In the diagnosis of a mental condition, the value of a personal psychiatric or psychological interview and other manifestations of patient cooperation has been continually reaffirmed by factual studies[27] and judicial decisions.[28]

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[24] *See* Respondent's Appendix D, "Chart of Petitioner's Reasoning," which purports in a limited sense to describe the flow of Petitioner's reasoning.

[25] The assumption that you cannot treat an inmate who does not trust his psychiatrist is contrary to both the legislative basis for Art. 31B and the record of its successes. One of the symptoms of defective delinquency is a non-trusting, exploitive relationship to other people. Further, both the general recidivist record and its successes with previous non-cooperators shows Patuxent staff's validation of the legislative basis and the Maryland legislature's careful craftsmanship in drafting Art. 31B.

[26] This second factual assumption is dealt with elsewhere (*see* Respondent's Brief, Argument IB2).

[27] *See, generally,* Rapaport & Marshall, "The Prediction of Rehabilitative Potential of Stockade Prisoners Using Clinical Psychological Tests," 18 *J. Clinical Psychology* 444 (1962); Affleck & Garfield, "Predictive Judgments of Therapists and Duration of Stay in Psychotherapy," 17 *J. Clin. Psych.* 134 (1961); Freeman & Mason, "Construction of a Key to Determine Recidivists From Non-recidivists Using the MMPI," 8 *J. Clin. Psych.* 207 (1952); Bergin, "Some Implications of Psychotherapy Research for Therapeutic Practice," 71 *J. Abnormal Psych.* 235 (1966); Krash, "The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia," 70 *Yale L.J.* 905, 918 (1961). These

Only slightly different from the general question of cooperation is the issue of cooperation in answering personal questions asked at an examination; slightly different than that concern is the problem of answering questions which focus upon past or present criminal conduct.

The administrative inability of bifurcating or even trifurcating the question of patient cooperation into classifications which would allow for partial non-cooperation is adequately illustrated in Petitioner's brief: (1) The answer to *any* question could provide "a link in the chain of evidence" sufficient to connect Petitioner to criminal activity, *see Malloy v. Hogan*, 378 U.S. 1, 11 (1964); and (2) one of the areas of greatest concern to the Patuxent staff is an inmate's history of criminal behavior, to show "antisocial behavior," which is part of the definition of a defective delinquent in Art. 31B, § 5. *See also State ex rel. Haskett v. Marion County Criminal Court, supra.* As Petitioner's brief points out (pp. 38-39), this area is an in-

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reference and others are not cited in support of a given theory or to prove a given result. However, implicit in the fiber of clinical psychology is that proper diagnosis of a present mental condition requires some type of input that can only be gained by the patient's cooperation (catatonia excepted). Unless Petitioner's posited "other means" of diagnosis and treatment include some type of "A Clockwork Orange" methodology ("Ludovico Technique," truth serum, lie detectors, hypnosis, lobotomy), the need for patient cooperation is paramount. Petitioner's references merely establish that valuable information can be gained without cooperation, a fact that Respondent does not deny. However, there is more than a mere basis in fact to support the Patuxent staff's conclusion as to the necessity of cooperative patient input in diagnosis of defective delinquency.

[28] *See, generally, United States v. Day*, 333 F. 2d 656 (6th Cir. 1964); *Rollerson v. United States*, 343 F. 2d 269 (D.C. Cir. 1964); *Krupnick v. United States*, 264 F. 2d 213 (8th Cir. 1959); *Gearhart v. United States*, 272 F. 2d 499 (D.C. Cir. 1959); *United States v. Albright, supra; State v. Whitlow, supra; State v. Musgrove*, 241 Md. 521, 217 A. 2d 247 (1966).

dispensably pertinent concern for the diagnosis of defective delinquency. The focus upon past criminal behavior is not for the purpose of singling out a "highly selective group inherently suspect of criminal activities." *See Albertson v. S.A.C.B.*, 382 U.S. 70, 79 (1965). Since Patuxent referrals are all criminally tried and convicted individuals, there is certainly no purpose in using Patuxent as a high-priced trap to catch the unwary criminal and further enmesh him in the correctional process. Unlike the *Alberston* situation, the whole raison d'etre of Art. 31B is to liberate otherwise hopelessly criminal individuals from the correctional system and liberate the public from the costs of a high recidivist rate.

The "focusing" on criminal activities of inmates and referred individuals is not, therefore, the mark of evil intentions, but rather the indispensable means of identifying a type of compulsively anti-social individual, the defective delinquent.

In support of this argument, Petitioner has noted several courts in Maryland that have required Patuxent officials to attempt to diagnose without personal cooperation. by reference to these cases Petitioner has proven too much. In effect, he has shown the availability of a judicial hearing where an inmate is not cooperative if — and only if — in that particular case the staff feels that there is enough on the record to support the presence or absence of defective delinquency, in the opinion of the Patuxent staff. However, by reference to his own sparse record, Petitioner has proven too little. He has shown that, in his case, without his cooperation the Patuxent staff would never be able to make the necessary diagnosis as to the presence or absence of defective delinquency.[29]

[29] *See* Affidavits in Appendix A-C, Respondent's Brief.

Were Petitioner's position adopted by this Court, the mode of identifying and treating the criminally insane in this country would be put in disarray. An individual suspected of being mentally ill would be free to remain silent, with the manifest result of wrongful diagnosis of insanity and/or an epidemic of refusal. *Compare United States ex rel. Schuster v. Herold, supra* at 1086-87. Indeed, the insane, by refusing to raise the insanity defense, could, it is contended, frustrate the desirable and humanitarian aspects of 18 U.S.C.A. § 4245 (mental incompetency undisclosed at trial), which presently requires the Director of the Bureau of Prisons to notify the district court wherein the conviction was had of the probable cause that the prisoner was mentally incompetent at the time of trial (where commitment could exceed the sentence originally imposed), thus leaving the ill untreated.

In *People v. Lipscomb, supra,* the defendant claimed his Fifth Amendment rights were violated by § 3100.6 of the California Welfare & Inst. Code. The Court in *Lipscomb* observed that to apply the self-incrimination doctrine to civil commitment proceedings for all types of mentally and physically irresponsible persons would do violence to the legislative policy upon which the law is based. (In both California and Maryland the statements made are not used in later criminal proceedings.) The Court's attention is directed to the excellent language found in *Lipscomb* at pp. 130-31, wherein the needs of society vis-a-vis the individual are discussed in the context of a psychiatrist's examination. This was further amplified by Judge Winter in *United States v. Albright, supra:*

> "Not only to enable the government to carry its full load, but also to respect the inviolability of the human personality, the examination here was indicated. Should defendant's claim of self-incrimination be upheld, the government, to meet its burden of proof,

> would have access to only three kinds of proof: cross-examination of defendant's experts, lay testimony, and testimony of government experts predicated upon courtroom observations and hypothetical questions. Medical science, as Rollerson v. United States, 110 U.S. App. D.C. 400, 343 F. 2d 269 (1964), eloquently recognizes, deems these poor and unsatisfactory substitutes for testimony based upon prolonged and intimate interviews between the psychiatrist and the defendant. Half truths derived from these unsatisfactory substitutes do more to violate human personality than full disclosure, especially because there is always the possibility that the psychiatrist who examines for the government and thus has full knowledge of a defendant, may corroborate his contention that he is legally insane." 388 F. 2d at 724-25.

See also Battle v. Cameron, 260 F. Supp. 804, 806 (D.D.C. 1966).

The end result of holding that Petitioner is not required to submit to a psychiatric examination will be the frustration of every sexual psychopath statute in the country and chaos in the determination of insanity in criminal cases.

In his Argument II(c) Petitioner asserts that "from his own mouth" the State seeks "the basis for making that [actual danger to society] determination" which "leads to indefinite incarceration" and is thereby "incriminatory" regardless of "labels" of "civil" or "criminal." One of the inarticulated bases of this argument is that there exists a right to avoid civil commitment as a part of "substantive due process" and that Petitioner can exercise a type of "self-help" (non-cooperation) to enforce that right.[30] *See* Petitioner's Brief, p. 15.

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[30] Since almost half of those referred to Patuxent for diagnosis are determined to be non-defective delinquents, the best strategy for a non-defective delinquent is cooperation.

It was an established principle of law, current during the Constitutional Convention of 1789 which produced the Fifth Amendment right against self-incrimination, that the right ought not apply to civil proceedings. In civil actions then, as now, a party against whom a judgment had been rendered was bound on pain of being held in contempt of court to divulge the location of his assets and property in order to satisfy the judgment. The Constitutional Convention specifically rejected the application of the provision against self-incrimination to civil proceedings. The research done by Levy in *The Origins of the Fifth Amendment* discloses that James Madison originally conceived of the Fifth Amendment right against self-incrimination to include civil as well as criminal proceedings. The Convention did not adopt the Madison version and restricted the right. *See* Levy, *ibid.*, pp. 423-26.

2. *Failure to allow the state to require that an inmate cooperate instead of waiting out his alotted sentence would frustrate the entire process of defective delinquency diagnosis and treatment.*

Although the Internal Revenue Service can occasionally reconstruct an individual's income picture without his cooperation, it is readily apparent that the entire revenue structure of this country would be jeopardized if objective reconstruction were made necessary because of the whim of non-cooperative taxpayers.

The story of Lawrence McKenzie, recounted in part by Petitioner (Brief for Petitioner, pp. 24-27), is an illustration of the difficulty of the "objective reconstruction" approach to diagnosing defective delinquency. Transferred to Patuxent on January 13, 1965, McKenzie refused to be examined on at least sixteen different occasions before the

Patuxent staff was judicially compelled to make a "blind guess," stating:

> "This patient has never been examined by the Institution Diagnostic Staff. While on the basis of the information available to us he might seem to satisfy the criteria of Defective Delinquency by virtue of his repeated antisocial activity and obvious danger to children, as well as the possibility of some inferred emotional unbalance, such a conclusion would be open to revision by the provision of some modicum of information from the patient. Since the Court has ordered an 'examination' and recommendation in regard to this patient, the only recommendation that can be made here is that he be committed to this Institution as a Defective Delinquent since he is, on the basis of history alone, a clear and present sexual danger to children in the community."

The summary report contained information from the following sources:

(1) FBI records of past offenses and indecent conduct, particularly toward minors. *Query:* If a non-cooperator is a first offender, at least under the alias he is using, wherein would the source of this information be found?

(2) A social questionnaire answered by his sisters. *Query:* Would his family also be entitled to not cooperate? Where would Patuxent conveniently learn about an out-of-state resident's family?

(3) Academic record (including a college degree in Naval Science). *Note:* Consider the non-cooperative school drop-out, perhaps from out of state.

(4) Military history, including a dishonorable discharge for lascivious conduct. *Note:* Consider the draft evader.

(5) Electroencephalographic examination for organic brain damage. *Note:* McKenzie refused to cooperate.

(6) Disciplinary infractions. *Note:* Consider the new admittee's lack of a disciplinary record, or the normally well-behaved individual with an aberration not likely to show up in the disciplinary records (*e.g.*, arsonist).

(7) Patient's version of current offense. McKenzie gave some discussion. *Query:* What if he refused to talk about it at all? Also, would *Miranda v. Arizona, supra*, compel the non-questioning once a refusal was given?

(8) Family history (see no. (2)).

(9) Religion, school history, work history, military history, sexual and marital history, hobbies and interests, psychiatric history. *Note:* Inability to personally examine McKenzie led to inadequate information.

Throughout the summary are the Patuxent staff's warnings about the extreme tentativeness of its conclusions. Had McKenzie lacked a continuous documented history of child molesting or other classic symptoms of anti-social behavior, Respondent submits that diagnosis would have been impossible. McKenzie, as a continual offender, with a college degree, left a fairly traceable "paper trail" of his actions. Imagine the situation the staff would be confronted with by a non-cooperative offender who is a drop-out, from out of state, who lacked a military history. This hypothetical individual, or one possessing many of the traits, is not hard to imagine as a reality.

Disallowing required cooperation might well create a discriminatory situation against those individuals who have a "paper trail" who, paradoxically, in many circumstances might be the better behaved.

Disallowing required cooperation would leave free from attack only those statutes possessing objectively rigid standards (subsequent offender or sex offender statutes)

and subject to attack or frustration all statutes which require a determination as to whether the particular individual is a fitting and proper subject for indeterminate sentencing.[31]

There have been many occasions when this Court has attempted to set up as absolute a given individual's prerogatives against attempts by governmental bodies to implement and advance a well-defined, compelling interest. *See Ashton v. Cameron Co. W.I. Dist. No. One*, 298 U.S. 513 (1936); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 427 (1895); *Dred Scott v. Sandford*, 60 U.S. 393 (1857). In each case, where the government's interests were genuinely compelling and the individual's prerogative genuinely of lesser importance, the end result of this Court's actions has not been enduring constitutional rights but instead frustration of governmental and community purposes.

The need of the community to find a means to protect itself by means of reformation from otherwise unreformable subsequent offenders is absolutely genuine. The means chosen are necessary and proper; in fact, they are, in Art. 31B, restrained and judicious. Denying Maryland the tools of rehabilitation may compel her to return to the weapons

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[31] Compare the objectively rigid statutes (a) with those requiring some type of personal diagnosis (b):

(a) Ohio Rev. Code Ann. Sec. 2947.25 (Baldwin 1958) (must refer for examination all persons convicted); Utah Code Ann., Sec. 77-49-1 (1953) (convicted of rape . . . the judge shall order a mental examination);

(b) Mass. Ann. Laws, Ch. 123A, Sec. 1 (Supp. 1958) (general lack of power to control his sexual impulses); Ill. Rev. Stat. Ch. 38, Sec. 820.01 (1959) (mental disorder . . . coupled with criminal propensities); Pa. Stat. Ann. Titl. 19, Sec. 1166 (1958) (threat of bodily harm); 42 U.S.C.A. 3413 (addict likely to be rehabilitated by treatment).

of vengeance (*e.g.*, mandatory indeterminate incarceration for habitual criminals convicted of certain crimes).

3. *The Maryland Statutory Scheme embodied in Art. 31B requires inmate cooperation.*

The psychological examination required by Art. 31B, § 7(a), mandates personal interviews with the examinee in order to reach a valid determination. Psychological tests are an important part of the evaluation process at Patuxent Institution, which render any determination made more valid than under any of the twenty-five sexual psychopath statutes set forth in Respondent's statement of the case. That the same are not required under any of the foregoing statutes, and are generally not done in most mental hospitals as a matter of routine procedure, is clear. (J.A. Md., 621.) Further, a determination based on tests and data from other psychological tests would lack the proper validity by reason of lack of information regarding the test protocols; the validity of the prior tests which can only be determined by the administrator of the same, the age of the prior tests, and the fact that the prior tests given might not be the ones necessary to a determination of defective delinquency. The validity of a psychological test comes primarily from the tester's observation of the examinee and in his ability to create a proper atmosphere for the administration of the test. If the examinee is anxious, does not understand instructions, or has a poor grasp of the language, these factors would make the test invalid. A psychologist observing the results of someone else's examination would have no way of knowing whether any of these factors entered into the final results. The necessity, therefore, of recent tests given by the examining psychologist in order to make a determination of defective delinquency is set forth in the Affidavit of Dr. Sigmund Manne, attached to Respondent's Brief as Appendix B.

Art. 31B, § 7(a), sets forth one of the more valid methods of determining anti-social mental illness in any statutory scheme in this country. The record is replete with testimony showing the necessity of personal examinations in order to avoid slipshod or invalid diagnoses. The staff at Patuxent Institution is highly dedicated to its task.

> "This Court was most favorably impressed by the Director and his staff who testified. They impressed the court as being capable, and humane, truly interested in the inmates as individuals, and sincerely endeavoring under extremely trying circumstances, to help them to improve themselves, and hopefully, to be released." *Sas, supra,* 295 F. Supp. at 420, n.79.

Petitioner assumes that Art. 31B requires an examination and evaluation by a psychiatrist only, without referring to the multi-disciplinary necessity of an examination by a psychologist and medical doctor contained in Art. 31B, § 7(a). In support of his assumption that a psychiatrist can diagnose without the necessity of a personal examination are cites to the inapposite cases of *McKenzie v. Director,* Law No. 39033, Circuit Court for Prince George's County, Opinion and Order dated July 7, 1970, and *Davis v. Director,* Misc. Pet. No. 4410, Circuit Court for Montgomery County, Opinion and Order dated Dec. 11, 1971.

McKenzie involved facts dissimilar to those before this Court. Quoting from the Opinion and Order in *McKenzie* the testimony of Dr. Manfred S. Guttmacher in *Director v. Daniels* "that diagnosis of a referred inmate who 'remains completely silent' would require 'a long period of surveillance . . .'" is misleading. The full statement of Dr. Guttmacher was that:

> "Well, we have very few objective tests in our field. The same thing is true, of course, in the commitability

to a hospital. *If the patient remains completely silent, you would have a great difficulty in making a diagnosis. You would have to have a long period of surveillance to be able to arrive at a diagnosis.* It is what the patient says and what the patient does, and the doing is very important as well as the saying." (Emphasis supplied.) (J.A. Md., 258-)

Dr. Guttmacher did not say that one *could* make a diagnosis, but implied in the proper case that it *might be possible.* Dr. Boslow was very clear in his testimony before the United States District Court for the District of Maryland in *Sas v. Maryland,* 295 F. Supp. 389 (D. Md. 1969), when he stated, in response to a question by the Court as to whether he would make a diagnosis based on reliable information in the record:

"(The Witness) No, sir, I would feel that I could not make an adequate professional judgment on that basis . . . . *No sir, because it would be unfair to both the patient and the man giving the opinion.* The patient might be psychotic, for all you know, and you would not be able to evaluate this without an interview. . . .

"(The Court) Because it might be something more than defective delinquency; it might be an actual psychosis.

"(The Witness) Yes, sir." (Emphasis supplied.) (J.A. Md., 310-13.)

This testimony was clearly reinforced by Dr. Boslow in his testimony before the Court in *McKenzie, supra,* held on May 1, 1970. He testified that a personal examination meant exactly that, an interview with the patient, and that there was no substitute for a personal interview because "you can make certain generalities, but you cannot say what is going on." *McKenzie, supra,* Transcript of Testimony, p. 51. *See also* pp. 49-52. Notwithstanding the obvious import of this testimony, the Court in *McKenzie* held

that because a psychological examination had been given at Patuxent Institution, in this particular case there was sufficient information for the psychiatrist to also make an examination. The Court in *McKenzie* further overlooked the obvious import of *State v. Musgrove, supra*, where the Court of Appeals of Maryland held that the personal examination *meant* personal examination if the examiner felt it necessary in order to reach a valid opinion:

> "Conceivably, this would not always require the patient to talk to the examiner although it would seem that usually it would, as the record indicates was true in the case before us. Significantly, the requirement is not only that the examination be 'personal' but that it also be the '[examiner's] own.' *This, we think, unequivocally implies that the examiners were to apply their expert knowledge in reaching a determination as to the defective delinquency of the patient.*" (Emphasis supplied.) *State v. Musgrove*, 241 Md. at 531.

When forced by the Court to make a determination in *McKenzie, supra*, Patuxent Institution did not relate solely that "it is the opinion of the staff of this Institution that Lawrence Harper McKenzie is a defective delinquent . . . ." What the report of Patuxent Institution did say was:

> "This patient has never been examined by the Institution Diagnostic Staff. While on the basis of the information available to us he might seem to satisfy the criteria Defective Delinquency by virtue of his repeated antisocial activity and obvious danger to children, as well as the possibility of some inferred emotional unbalance, such a conclusion would be open to revision by the provision of some modicum of information from the patient. Since the Court has ordered an 'examination' and recommendation in regard to this patient, the only recommendation that can be made here is that he be committed to this Institution as a Defective Delinquent since he is, on the basis of

history alone, a clear and present sexual danger to children in the community."

Thus, Patuxent takes its duties seriously, insisting on making the most valid determination possible.

Davis, supra, again involved findings by the Circuit Court for Prince George's County, as set forth on p. 28 of Petitioner's brief, that " 'direct verbal communication between inmate and psychiatrist, although desirable, is not indispensable' to making the report required by statute . . . ." The Court in *Davis* again dwelt solely on the ability of a psychiatrist to make an examination without a personal interview and not on the ability of the psychologist to make such a diagnosis without his testing procedures.[32] The Court accepted the testimony of Dr. Brian Crowley that a diagnosis without personal interview was in fact possible, citing catatonic schizophrenia, a condition exhibiting symptoms of the total withdrawal of an individual from reality. Such a diagnosis could be made by virtually any lay individual and is an inadequate basis for the statement:

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[32] The State filed a petition for the issuance of a writ of certiorari to the Circuit Court for Montgomery County in the Court of Special Appeals of Maryland, which denied the same on January 8, 1972, but including the following language:

> "It appearing that the order sought to be reviewed was entered in apparent disregard of the clear dictates of *State v. Musgrove,* 241 Md. 521; it further appearing, however, that the order sought to be reviewed was entered in a habeas corpus proceeding, and that this Court is without jurisdiction to review orders entered in such cases, either on direct appeal, *Hudson v. Superintendent,* 11 Md. App. 253, or on certiorari, Md. Code, Art. 5, §21, it is this 8th day of January, 1972, ordered by the Court of Special Appeals of Maryland, that the petition for a writ of certiorari to the Circuit Court for Montgomery County in the above-entitled case be, and it is hereby, denied for lack of jurisdiction." *Director v. Davis,* Court of Special Appeals of Maryland, Misc. No. 23, Sept. Term, 1971.

Petitioner's reference to the "dictum" in *Musgrave, supra,* overlooks the holdings in *Wise v. Director, supra; Knox v. Director,* 1 Md. App. 678 (1969).

"Thus, it is factually inaccurate for the state to assume in all cases and without further explication that an inmate such as McNeil must be personally interrogated before he can be diagnosed" (Brief of Petitioner, p. 28.) The concern over such a "blind diagnosis" is fully set forth in the affidavit, attached as Appendix C to Respondent's Brief, by Dr. Harold M. Boslow, Director of Patuxent Institution.

4. *There are no fair and effective lesser restrictive alternatives to a compelled personal psychological examination of inmates referred to Patuxent,*

Initially, Respondent submits that (a) differences in place of incarceration, per se, and (b) the "right" not to be psychologically examined are *not,* at least for criminally tried and convicted individuals, such "fundamental liberties" as to compel the State to use "the least restrictive alternative" available to it. *Compare Shelton v. Tucker,* 364 U.S. 479 (1960); *Sherbert v. Verner,* 374 U.S. 398 (1963); *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963).

As shown in other arguments, (1) Patuxent is not such a "strikingly" dissimilar *place* from other penal institutions, in an *adverse* sense, as to compel a prior hearing before transfer; Respondent concedes that the *status* of defective delinquency is so "strikingly" dissimilar from prison inmate as to require a full-scale trial as provided for in Art. 31B, § 8. *Compare Baxstrom v. Herold, supra;* and *Covington v. Harris, supra* (note taken of "striking" dissimilarities between criminal and civil hospitals for the insane); (2) aside from the possibility of commitment to Patuxent, there is no substantial reason for refusing to cooperate.

However, there is a compelling governmental interest in requesting this Court, if it should find flaw in the Maryland procedure, to give some indication as to what it considers to be effective lesser restrictive alternatives.

A review of these alternatives, it is suggested, would show that (1) many are ineffective, and (2) the remainder, though constitutionally acceptable, are much more drastic.

a. Rebuttable presumption of defective delinquency flowing from diagnostic non-cooperation.

The State is confident that there is a basis in fact for concluding that non-cooperators are, more probably than not, defective delinquents. *See Leary v. United States*, 395 U.S. 6 (1969) (criminal test "rational connection"); *Mobile J. & K.C. R.R. Co. v. Turnipseed*, 219 U.S. 35 (1910) (civil test not "purely arbitrary"). *See, generally, Note*, Presumptions, Assumptions, and Due Process in Criminal Cases — A Theoretical Overview," 79 *Yale L.J.* 165 (1969). The State's concern with this possibility is not the constitutionality, but the advisability, of its use. This alternative merely defers until a later day the need for cooperation. As with presumptions in other areas, it increases the chance of non-delinquents being placed in Patuxent when compared with the present method.

Analogous to this alternative are procedures differing from it in form but not in substance. *See Lee v. County Court of Erie County*, 33 App. Div. 2d 1093, 308 N.Y.S. 2d 240 (4th Dept. 1970), *modified*, 27 N.Y. 2d 432, 267 N.E. 2d 452 (1971), *cert. denied*, 404 U.S. 823 (1971) (trial court struck an insanity defense and appellate court modified, holding proper remedy to be disallowing defendant the opportunity of presenting psychiatric evidence), *criticized in Case Note*, 38 *Brooklyn L.R.* 211 (1971). In *Lee* the New York Court of Appeals felt compelled to take this novel step because of the difficulty in using the results of a *pre-trial* psychiatric examination in a *non-bifurcated* trial, noting the possibility of damaging admissions going to the question of guilt. These difficulties do not present themselves in the Maryland statute.

In passing, it might be mentioned that if Maryland were to make non-cooperation a crime punishable by indeterminate commitment at Patuxent for anyone tried and convicted of a crime permiting referral, there is a possibility that such action would not be cruel and unusual punishment. *See Annotation,* "Cruel Punishment, Length of Sentence," 33 A.L.R. 3d 335 (1970).

It is urgently suggested that these alternatives, as damaging as the present one, would not serve the State of Maryland's legitimate interest in isolating for treatment a "clearly defined" group of defective delinquents. *See Director v. Daniels, supra.*

b. Information from sources not requiring personal examination and/or other general cooperation.

(1) Social history type report.

One can only surmise how potent Petitioner Murel's indictment of the administrative fact-finding process would have been had Patuxent officials been denied the opportunity for a personal interview and/or other input resulting from inmate cooperation. *See* briefs in *Murel v. Baltimore City Criminal Court, supra.* Whether in given cases this method of blind guessing would provide the necessary residuum of non-hearsay evidence of sufficient probative value is anybody's guess. *See generally, Annotation,* "Hearsay Evidence in Proceedings Before State Administrative Agencies," 36 A.L.R. 3d 12 (1971).

(2) Lie detector.

As Bailey & Rothblatt point out in *Investigation and Preparation of Criminal Cases* 370 (1970), the optimum conditions for the accuracy of a polygraph test are (a) voluntariness, and (b) proper physical and mental condition. For further research, *see generally Annotation,*

"Truth and Deception Tests," 23 A.L.R. 2d 1306 (1952).
(3) Observation in controlled environment.

Whether concealed, care examination of a subject's daily routine would provide, in itself, sufficient evidence of defective delinquency is quite speculative. However, it would seem to be very drastic to put an inmate in the position of feeling that every action he might take or word that he might say is being scrutinized for hidden meaning. Patuxent staff members might well object, on ethical grounds, to risking the inducing of paranoia in order to diagnose defective delinquency.

c. Alternate means of committing defective delinquents in a manner not involving personal evaluation and/or inmate cooperation.

Rigidly objective standards in subsequent offender statutes or habitual criminal statutes allowing for indeterminate sentences have been held constitutionally permissible. *See Graham v. West Virginia, supra.* Under such circumstances, if the indeterminate sentence were mandatory, then, although constitutional, such a statute would be both under- and over-inclusive as to the legitimate needs of the State. If the indeterminate sentence was discretionary with the trial judge, then the *very best* that could be hoped for is a "clandestine Patuxent" doing what an overt Patuxent was forbidden to do.

C. Whether Or Not An Inmate Has Served the Time Allotted by the Criminal Sentence Is Irrelevant to the State's Right to Civilly Commit Him.

1. *Commitment status prior to expiration of his originally imposed sentence.*

In the absence of a showing of constitutionally impermissible conditions of habitability, an inmate has no vested

constitutional right to a given place of confinement as opposed to other places; administrative transfers based upon reasonable purposes, from one place of confinement to another, are not offensive to the Constitution. *See Young v. Wainwright*, 449 F. 2d 338 (5th Cir. 1971); *Wilwording v. Swenson*, 439 F. 2d 1331 (8th Cir. 1971); *Thogmartin v. Moseley*, 313 F. Supp. 158 (D. Kan. 1969); *United States ex rel. Gallagher v. Daggett*, 326 F. Supp. 387 (D. Minn. 1971); *Courtney v. Bishop*, 409 F. 2d 1185 (8th Cir. 1969).

2. *Commitment status after the expiration of his originally imposed sentence.*

Whether or not an inmate gains a constitutionally vested interest in a formally announced sentence depends upon the nature and purpose of the sentencing and/or dispositional process. For illustration, if judicial officials deferred all sentencing until they received information to base a referral to Patuxent upon, it would be perfectly apparent that the only issue involved is the constitutionality of an indeterminate sentence for specified crimes; such sentences are constitutionally permissible. *See Graham v. West Virginia, supra.* Does the intervention of a conventional sentence between the determination of guilt and the dispositional decision to commit an individual for an indeterminate sentence lead to a different conclusion?

It must be noted that a sentence is the final judgment in a criminal case. *See Corey v. United States*, 375 U.S. 169 (1963); *Berman v. United States*, 302 U.S. 211 (1937). In *Corey v. United States, supra* at 174, this Court stated:

> "A sentence under these provisions, which is imposed only after the whole process of criminal trial and determination of guilt has been completed, sufficiently satisfies conventional requirements of finality for purposes of appeal."

An individual must have been tried, convicted, and sentenced for specified crimes to be referred to Patuxent, Art. 31B, § 6(a), of the Annotated Code of Maryland. The conviction and sentence are jurisdictional requirements in considering this referral. *See Gee v. State,* 239 Md. 604, 212 A. 2d 269 (1965).

Thus, the function of the final judgment or sentence in a criminal case in Maryland, for Art. 31B purposes, is to define a class of individuals subject to civil commitment to Patuxent; the purpose of the sentence is emphatically not to limit the time of treatment. In *Graham v. West Virginia, supra,* the use of a prior criminal sentence as a basis for life imprisonment was held constitutional. The present situation differs from *Graham* and other cases only in that the statutory scheme establishing the basis of commitment is crafted with greater care.

The interest that an inmate has in knowing when his sentence will be completed is a real one. However, in the early stages of his confinement,[33] the State submits that such an interest is not vital. It is pertinent to note that the State of Maryland protects the expectancy of release held by an inmate during the later stages of his sentence. *See* Art. 31B, § 6(c), Md. Ann. Code (1971 Supp.) (no court order for examination during last six months of sentence).

In contrast to this less than vital interest of the inmate at the early stage of his confinement is the compelling interest of the State in not allowing an individual referred for examination to "antisocially wait out his allotted time." *Director v. Daniels, supra* at 40.

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[33] Most requests for examination of inmates are made before or during the very early stages of confinement.

CONCLUSION

After Petitioner's trial and conviction for attempted rape and for assault on a police officer, the trial judge, in considering disposition, was confronted with his criminal record which included a prior rape and other crimes of violence. Also, he was confronted with a psychiatric evaluation of the Petitioner concluding that he was an "actual danger to society" and recommending his referral to Patuxent Institution.

An individual psychiatrist's recommendation, while sufficient to sound a warning, is insufficient under the Maryland Defective Delinquency Act to amount to a full-scale recommendation of commitment although sufficient in many other states. Therefore, Petitioner was sentenced and then, by court order, referred to Patuxent for examination where he could be interviewed, tested, and examined by "at least three persons on behalf of the institution for defective delinquents, one of whom shall be a medical physician, one a psychiatrist, and one a psychologist." Art. 31B, § 7(a).

Petitioner came to the examination area at Patuxent on August 10, 1966. From that time up to and including February 14, 1972, he formally refused to be examined, tested, and/or interviewed at least eighteen times and formally refused schooling.

And why does he refuse? If it is because of a lack of "trust" in his psychiatrists, this Court must tell him that the State of Maryland has an overwhelming interest in ensuring that defective delinquents, who are symptomically plagued with an untrusting, exploitive nature, are not exempt from treatment for this disease merely because they display one of its virulent manifestations. If it is because of the much-vocalized, never-proven risk of criminal incrimination, this Court must recognize and reaffirm

that the records reveal that, in Patuxent's seventeen-year history of operation, this risk has never materialized due to a combination of statutory, judicial, and administrative protections given to inmate confidences. If it is because of the fear of civil commitment, this Court must denounce and destroy the myth that misconduct brings reprieve and the hope that in silence there is security. This denunciation is necessary and proper because only through cooperation is diagnosis possible; only through diagnosis is treatment possible; and through treatment the recurring nightmare of recidivism can become past history instead of an ever-present fear.

Moreover, Petitioner's present fear of commitment and a lost lifetime are more in his mind than in reality, since about half of those diagnosed are not committed and, of those committed, the average stay is five years. For if this Court were to hold that Petitioner's silence is golden, then it would debase the credibility behind each and every commitment statute which places a premium upon ensuring that an individual committed can be an individual treated. The twenty-five jurisdictions which have embarked upon a statutorily mandated journey to a more humane correctional system ought not find the road washed out.

The State of Maryland asks for nothing more than the tools and procedures necessary to implement the "right to treatment"; after the years of social soul-searching, legislative craftsmanship, and administrative concern and success necessary to make Art. 31B a reality, the State of Maryland deserves nothing less.

It is an absurdity to think that for some reason the administration of Patuxent Institution desires to maintain a situation where the inmate does not cooperate with the

commitment examination. Obviously an epidemic of refusals to participate in commitment examination frustrates the work of the Institution and in no wise achieves the Institution's goal of returning the patient to a useful role in society. Petitioner suggests the absurd and invites us to myopically view a situation which is removed from our more atavistic solutions to anti-social conduct. It is ironic that Petitioner's greatest fear may well be the realization of his own illness.

Thus, it is respectfully submitted that the judgment of the Court of Special Appeals in and for the State of Maryland be affirmed, making possible the vision of Dr. Emory F. Hodges, who said:

> "I predict that most states will enact a similar statute within the next five to eight years. I further predict that 20 years hence psychiatric historians will regard this statute as one of the major accomplishments of the middle third of the 20th century."

Respectfully submitted,

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APPENDIX A

AFFIDAVIT

State of Maryland, Anne Arundel County, to wit:

I Hereby Certify that on this 13th day of April 1972, before me, the Subscriber, a Notary Public of the State of Maryland, personally appeared Giovanni C. Croce, M.D. and made oath in due form of law that he is the duly appointed Associate Director (Psychiatry) of Patuxent Institution; That at the request of the Attorney General of Maryland he has been requested to file the following Affidavit regarding the ability of Patuxent Institution to evaluate a patient without the benefit of a personal examination pursuant to Article 31B, Annotated Code of Maryland.

The purpose of the psychiatric examination is to discover the origin and evolution of such personality disorders as may be interfering with the efficiency and the social adjustment of the patient. Psychiatric examination is accomplished first from the anamnesis (total history) given by others, and second from the direct personal examination of the patient. The anamnesis will provide a biographical and historical perspective of the personality and a clear picture of the living person as a specific human being with his individual problems. Psychiatric social examination has, therefore, as its immediate end, an understanding of the patient's personality and behavior, approaching the problem from a developmental point of view, bringing together data concerning the individual's heredity, his physical and mental make-up, his social and material environment, the personalities in the family group and his reaction to them from the time of childhood to the present.

The second part of the examination consists of the direct observation of the clinical picture presented by the patient.

Understanding of the patient's illness can be achieved only through a mental examination, which is done by a clinical study of a personality and should aim at a comprehensive appraisal of the patient. The psychiatric examination is commonly used to refer to the results of the mental status examination of the patient. Such an examination must, of course, include a thorough physical and neurological examination, together with all indicated laboratory examinations sufficient to discover all structural, functional, somatic and metabolic factors. Through the direct examination, the psychiatrist seeks to discover the relationship between the patient's past and the clinical picture that he presents at the time of the examination. Another purpose of the direct examination is to ascertain the patient's biologically, socially and psychologically determined needs.

The mental examination, which is fundamentally a personality study, will provide the examining psychiatrist with the appropriate information which will enable him to reach a diagnosis. As a matter of fact, as one observes the patient and proceeds with the examination, he will note various characteristics in the symptomatology as to suggest into which of two general types of reaction the disturbance falls, the organic or the psychogenic. Obviously, such a distinction could not be possible if the patient is not directly examined. The mental status examination contains specific references to the following areas: (1) attitude and general behavior, (2) consciousness, (3) apperception, (4) affectivity and mood, (5) conation and expressive aspects of behavior, (6) association and thought processes, (7) thought content and the mental trend, (8) perception, (9) memory, (10) fund of information, (11) judgment, (12) insight, (13) personality maturity, (14) psychometry and (15) mental deterioration and its measurement. (See Noyes, *Medical Clinical Psychiatry*, pp. 142 to 151; and, Arieti, *American Handbook of Psychiatry*, Volume One, pp. 218 to 226)

As indicated above, a psychiatric examination is an extensive study of the whole personality, with special emphasis on thought contents and their accompanying emotions. Only by the direct study of the patient's psychiatric, clinical picture and the individual characteristics and the assets of the patient is it possible to reach a diagnosis. Without some awareness of the patient's symptomatology, the psychiatrist cannot expect to make a diagnosis or properly make a valid evaluation, prognosis, degree of impairment and predisposition, nor will it be possible to make any plans for a future rehabilitation program. In the mental examination, the psychiatrist infers disturbances by noting abnormalities in the way the patient perceives, integrates and responds to the environment.

Although records and previous psychiatric and psychological examinations might be available, it is virtually impossible, by considering this exclusively, to reach a valid evaluation of the patient's present mental condition. On the contrary, such a narrowness might lead to absurdities and false interpretation of the patient's clinical picture. Many symptoms have adaptive and defensive values, others do not. It should be kept in mind that a personality might be defined as a sum of total reactions of a person to the environment. Perception, intellectual functions and affective states all influence this reaction and, therefore, it is imperative that these must be directly and carefully examined to be able to reach a valid understanding of the patient's overall personality structure.

In Testimony Whereof, I hereunto set my Hand

GIOVANNI C. CROCE, M.D.

As Witness My Hand and Notarial Seal

WAYNE LEE ELLIOTT,

(Seal) Notary Public.

APPENDIX B

AFFIDAVIT

State of Maryland, Anne Arundel County, to wit:

I Hereby Certify that on this 13th day of April, 1972, before me, a Notary Public of the State and County aforesaid, personally appeared Dr. Sigmund Manne, Chief Psychologist at Patuxent Institution, who made oath in due form of law as follows; that at the request of the Attorney General of Maryland he has caused to be written the following affidavit regarding psychological testing procedures at Patuxent Institution; For a psychologist to accept a past record and the observations of non-clinically trained observers as the basis for determination of Defective Delinquency would be an invalid process. When observations can be made over a long period of time by a trained observer, and then are coupled with the record, the process is more valid. The only valid method of determining present personality structure couples the above method with personal interview, and the placement of the patient in a standardized, structured situation; namely, psychological testing. If any of these factors are missing, an adequate determination of Defective Delinquency is not possible.

In considering the interview, Harry Stack Sullivan is quick to write, ". . . probably most people go into any interview with quite mixed motivations; they wish that they could talk things over frankly with somebody, but they also carry with them, practically from childhood, ingrained determinations which block free discussion." (Sullivan, H. S., The Psychiatric Interview, W. W. Norton and Co., Inc. New York, 1954, pp. 9-10). He further states, "To sum up, a patient's patterns of difficulty arise in his past experience and variously interpenetrate all aspects of

his current interpersonal relationships. Without data reflecting many important aspects of the patient's personality, the patient's statement of symptoms and the psychiatrist's observation of signs of difficulty are unintelligible.". (Ibid. pp. 15-16).

Although interviews may be divided into evaluative and therapeutic interviews, we shall here confine ourselves only to the evaluative interview. This can be further subdivided into an open interview, semi-structured interview, and structured interview. For the purposes of psychological testing, the evaluative interview is, generally of a semi-structured or structured nature. Questions are posed to the patient which are variable in a semi-structured interview and are designed to elicit information concerning the patient's background, attitudes, emotions, conflicts, defenses, and personality. In a structured interview, the questions are fixed, as is the order in which the questions are posed. However, the aim of the structured interview is the same as in the semi-structured interview, but circumscribes the examiner's freedom to deviate from the questions. Both are designed to elicit as much information as possible so that when combined with information derived from other sources, viz., test procedures, a valid determination of a patient's present condition can be achieved.

General considerations underlying psychological testing are that ". . . a person's distinctive style of thinking is indicative of ingrained features of his character make-up.", ". . . responses to the various test items of the battery we use are, almost entirely, verbalized end-products of thought processes initiated by these items." ". . . the subject must be made to think in a variety of problem-situations to enable the examiner to distinguish the pervasive, fundamental or pathological aspects of his characteristic adjustment-efforts. In any one situation he may present a

one-sided picture, in a variety of situations — in a battery of tests — a rounded and hierarchical picture can be expected." (Schafer, R., The Clinical Applications of Psychological Tests, International Universities Press, Inc. New York, New York, 1951).

Evaluation of the patient's present condition by means of standardized psychological test instruments is the integral part of the procedure at Patuxent Institution. The basic battery of psychological test instruments used at Patuxent Institution consists of (1) Wechsler Adult Intelligence Scale (WAIS), (2) Rorschach Inkblot Test, (3) Bender Visual Motor Gestalt Test, and (4) House-Tree-Person Test (HTP). Valid and reliable evaluation is considered the cornerstone of all clinical work (Thorne, F. C., Principles of Psychological Examining, Journal of Clinical Psychology, 1955). Buss (Buss, A Psychopathology, John Wiley and Sons, Inc., New York, 1966) describes psychological evaluations as a three part process involving a gathering of information and observations concerning the subject, placing the subjects in a category or class, and a drawing of inferences. This last step in the evaluative process concerns making a prediction of what the individual will do in situations other than the present one. (Anastasi, A., Psychological Testing, The MacMillian Co., New York, 1968).

The differential use of psychological testing is the process of identifying a disorder and distinguishing it from other disorders (Goldenson, R. M., The Encyclopedia of Human Behavior, Doubleday and Co., Inc., Garden City, New York, 1970). This is a difficult problem since (1) disorders may share symptoms, (2) symptom patterns may vary from subject to subject, (3) the same subject may exhibit different symptoms at different times, and (4) subjects may have more than one problem. These problems point up

the need to follow Thorne's (op. cit.) dictum to identify and judge all of the relevant factors at all levels of organization.

Threats to the reliability and validity of the evaluative process can occur at any of the previously mentioned three steps. If the observations gathered are faulty or incomplete, if the individual is incorrectly categorized, or if the inferences drawn are not based on fact, the evaluative process can be unreliable or invalid.

Anastasi (op. cit.) defines the use of psychological instruments as an objective and standardized measure of a sample of behavior. Standardized in this sense indicates a uniformity of procedure and of test instruments. Psychological testing is thus the application of the scientific method to a subject. The individual is the independent variable; all variance from test situation to test situation should be attributable to the independent variable, the subject being tested.

Psychological testing is thus a process of comparison, involving the detection of individual differences, and measuring these differences against normative data. One does not pass or fail a psychological test, one is only compared with other subjects in a culture, or with ones peers. In general, the norms against which a subject is compared are drawn from a professional body of knowledge.

Psychological testing is a viable and integral part of an evaluative process since it provides a complex of circumstances in which a subject's performance and behavior may be observed in a relatively short period of time. An individual presents a social face to the world (Jung, C. G., Collected Works, Two Essays on Analytical Psychology, Vol. 7, Pantheon Press, New York, 1953). Without the use of tests it could take long periods of continuous psy-

chological contact in order to ferret out the motives which are active but hidden behind the persona. An individual may not only seek to hide himself from the world, but it may also be necessary to hide his motives from himself, (Schaffer, L. E., and Shoeban, E. J. Jr., The Psychology of Adjustment, Houghton-Mifflin Co., Boston, 1956). In this situation the subject could not consciously present his true self to the examiner, even if he wished to do so. Psychological testing affords the examiner the possibility of knowing the subject, in a brief period of time, at several levels. It also provides for an up to date picture of a subject's current mode of function at multiple levels. Without psychological examination, the evaluative process would require twenty-four hour observation over a protracted period of time by trained observers, which is economically unfeasible from the standpoint of both time and money, and would be much less valid.

In tracing the history of psychological tests, Linden and Linden (Linden, K. and Linden, J., Guidance Monograph Series, Lilly S., Stone, C., and Shintzer, B., eds., Houghton-Mifflin Co., Boston, 1968) indicate that such tests were originally used to differentiate one individual from another on the basis of certain personality traits. In referring specifically to intelligence, Wechsler (Wechsler, D., Measurement of Adult Intelligence, 3rd edition, Williams & Wilkens Co., Baltimore, 1954) postulates the following definition, "Intelligence is the aggregate or global capacity of the individual to act purposefully, think rationally and to deal effectively with his environment." In keeping with this, Harrower (Harrower, M. in Wolman, B., Handbook of Clinical Psychology, McGraw-Hill Book Co., New York, 1965) states that psychological tests are used to describe an individual's functioning in its totality as well as to provide useful hypotheses about his future performance. Psycho-

logical testing, as Rosenzweig (Rosenzweig, S., Psychodiagnosis, New York, New York, 1949) indicates, is a combined process illuminating personality dynamics as well as providing for categorization of the subject. Thorne (Thorne, F. C., Theoretical Foundations of Directive Psychotherapy in Current Trends in Clinical Psychology, Ann. Sci, New York, 1948-49) extends this concept by indicating that tests assist in demonstrating etiological factors, estimate the extensity or intensity of the morbid process in relation to actuarial data concerning type and severity, determining a prognosis or probable cause, to provide a rational basis for specific psychotherapy, and to formulate a dynamic hypothesis concerning the nature of the pathological process. As Anastasi (op. cit.) noted, tests are considered as behavior samples from which predictions regarding other behavior can be made, an opinion which is amplified by Cronbach (Cronbach, L. J., Essentials of Psychological Testing, 2nd edition, Harper & Bros., New York, 1960) in discussing decision making based on psychological tests.

Thus, authorities agree that psychological tests are a vital part of the evaluation process. They are used to determine an individual's level of intellectual functioning from which decisions can be made with the subject concerning academic performance, the necessity for remedial action, and possible academic goals. Psychological tests are used to help develop insights into the dynamics or motivations underlying a subject's behavior from which meaningful predictions can be made about future behavior, and, perhaps more importantly, to help develop meaningful strategies in the psychotherapeutic relationships. The tests also serve as a gauge to measure the outcomes of therapy and to illuminate possible areas in need of further exploration. Psychological testing is not limited to un-

covering pathology, but is used to determine a subject's assets and potentialities, which in turn is used to aid the subject in redirecting or intensifying efforts in specific areas, thus helping him toward a more meaningful and self-fulfilling existence.

Although psychological testing is an important part of the evaluative process, it is important to know that proper tests have been given, and that the qualifications of the examiner are adequate. When the Patuxent Institution requests information from other agencies, it is not uncommon that only a summary of the psychological report is included. There is no way of determining what psychological procedures have been used, nor the qualifications of the examiner. The importance placed on the qualifications of the examiner can be seen in the restrictions placed on the sale of specific psychological tests by the Psychological Corporation of America. (The Psychological Corporation Test Catalog, 1972, The Psychological Corporation, 304 East 45th Street, New York, New York, 10017). When the staff of any institution does not have knowledge of the tests used previously or the qualifications of the examiner, it is virtually impossible to assess the validity of the examination.

When information concerning the psychological tests that are the basis of the reports from other institutions is known, too frequently the understaffed Psychology Department of these institutions has had to utilize "group" tests rather than "individual" tests in order to provide services as required. This is particularly true of correctional institutions. In every circumstance group tests are neither so valid nor so reliable as individual tests. In addition, data obtained from group testing of an incarcerated population is notoriously unreliable. It is easy to see that

group tests make no provisions for personal interviews, gathering of background information, or observation of subjects. While discussing malingering Anastasi notes that there are ". . . a few testing situations, especially in the examination of criminal offenders . . . in which the objectives of individual subjects may be fundamentally at cross-purposes to those of the examiner, a conflict which no amount of rapport may be able to reconcile." (Anastasi, A., op. cit.).

I.Q. scores reported from other institutions quite frequently are based on group intelligence tests. Even assuming that the subject was motivated to do his best, such group tests tend to correlate poorly with an individual test of intelligence such as the WAIS, the correlation varying anywhere from .40 to .80 (Anastasi, A., ibid.).

The group personality test most frequently used is the Minnesota Multiphasic Personality Inventory (MMPI). (Hathaway, S. R. and Meehl, P. E., An Atlas for the Clinical Use of the MMPI, The University of Minnesota Press, Minneapolis, 1951). Anastasi (Anastasi, A., Ibid.) indicates this can be a highly valid instrument when used properly, but it does demand that the subject have a seventh or eighth grade reading level, and, in fact, the admonition is that it not be used with subjects of low educational or intellectual level. At Patuxent Institution, of those subjects who did not have a High School Diploma entering prior to 1965 had an average grade placement of 5.0, while those entering Patuxent Institution after 1965 had an average grade placement of 4.6.

Though the MMPI has a built-in scale to detect if a subject is lying, experience at Patuxent has shown this scale to be relatively ineffective. The subjects at Patuxent Institution do manipulate the MMPI and try to place themselves in the best light possible. Since such subjects are

not motivated to, or cannot, display their true selves, this instrument cannot be the choice in an evaluative process.

In addition to the problem of group tests, some examiners have favorite evaluative instruments which are little used by the profession as a whole, though they may provide the specific examiner with information. The validity of these instruments frequently depends on the clinical intuition of the examiner. The psychological examination at Patuxent Institution consists of tests (as noted earlier) accepted by the profession and each instrument has a significant background of scientific investigation evidenced by its extensive bibliography.

Inasmuch as the reports of prior psychological examinations gathered by Patuxent Institution frequently are summaries, it is impossible to determine their validity. The actual protocol is not available and the summary is frequently an overall summary of the subject's overall behavior. Such summaries are often from six months to twelve years old. Since the essence of human personality is change, it is patently unfair and unprofessional to base a current evaluation or determination of Defective Delinquency on evaluative material which is out of date. Such information can be used as a basis as to the extent and intensity of change in the subject, particularly when it is compared to a current evaluation.

All the psychological tests used in the battery administered at Patuxent Institution are in general used throughout the United States, South America, and Western Europe. Extensive biblographies are available on each instrument. In the latest issue of Personality Tests and Reviews, Gryphon Press, Inc., Highland Park, New Jersey, 1970, Buros, O. K., editor, lists 3,749 references for the Rorschach Inkblot Test. In one cited study by Benjamin and Ebaugh, examiners' evalulations of subjects were compared with interviewers' evaluations, and complete agreement was

achieved in 85% of the cases. As the profession continues in its attempts to refine its instruments into more sophisticated evaluative instruments, new approaches are used to develop the validity of these instruments. As an example, current research on the Rorschach Inkblot Test is focused more on the stimuli inherent in the instrument, and understanding the properties of the stimuli as it interacts with a perceiving subject.

The WAIS standardization is well known. Wechsler (Wechsler, D., WAIS Manual, The Psychological Corporation, New York, New York, 1955) standardized this instrument on the basis of age, sex, geographic region, urban-rural residence, race, occupation, and education. These variables were the criteria used in assembling the standardization population in accordance with the 1950 U.S. Census. Using the odd-even method of determining the reliability coefficient, corrected by the Spearman-Brown formula, reliability was found to be .97. standard error of measurement 2.60, which indicates very high reliability.

Hammer, in describing the House-Tree-Person Test (HTP) indicates that drawings are never a primary tool in a test battery but are a graphic adjunct to verbal techniques (Hammer, E. F., DAP: Back Against the Wall?, Journal of Consulting and Clinical Psychology, Vol. 33, 1969). He further notes that the HTP is the third most commonly used instrument. Swensen (Swensen, C. H., Empirical Evaluation of Human Figure Drawings 1957-1966, Psychological Bulletin, Vol. 70, 1968) has observed increasing empirical support for the use of drawings as a clinical tool. Haworth (Haworth, M. R., in Buros, O. K., ibid.) reaches a similar conclusion emphasizing that the degree of meaningful data produced depends on the experience and orientation of the examiner and that global interpretation of this data will be most valid. When used alone the HTP can provide some clues as to the etiology of patho-

logical perceptions of the environment. Its power is increased markedly when it is used as one of a battery of tests as part of an evaluative process which includes the gathering of historical data, personal interview, and psychological tests.

The final psychological test used in the battery of tests administered to a subject at Patuxent Institution is the Bender Visual Motor Gestalt Test (Bender, L. A., Visual Motor Gestalt Test and its Clinical Use, Research Monograph American Orthopsychiatric Association, 1938). Reliability of this instrument is quite good, when evaluated by interscorer reliability. When a test-retest reliability is determined, the dynamic quality being measured results in low reliability. Thus, this instrument reflects the subject's current perceptual level. Billingslea (Billingslea, F. Y., The Bender-Gestalt: A Review and A Perspective, 1963) in reviewing the literature indicated this instrument could be a valuable additional tool in a battery of tests. He also found support for the use of this test in a battery looking for signs of organic brain damage.

When any of the elements of the psychological evaluation are missing, the validity of the evaluative procedure is lowered. To do a blind evaluation, to merely rely on reports of others, is to do a disservice to the subject, and is something an ethical practitioner would not do. Paraphrasing Dr. Robert M. Allen's comments in classes on psychological evaluation; blind evaluations are for blind men.

In Testimony Whereof, I hereunto set my hand

SIGMUND H. MANNE, Ph.D.

As Witness My Hand and Notarial Seal.

WAYNE LEE ELLIOTT,

(Seal) Notary Public.

APPENDIX C

AFFIDAVIT

State of Maryland, Anne Arundel County, to wit:

I Hereby Certify that on this 13th day of April 1972, before me, the Subscriber, a Notary Public of the State of Maryland, personally appeared Harold M. Boslow, M.D. and made oath in due form of law that he is the duly appointed Director of Patuxent Institution; That at the request of the Attorney General of Maryland he has been requested to file the following affidavit regarding the ability of Patuxent Institution to evaluate Edward Lee McNeil pursuant to the information contained in his file without the benefit of personal interview according to Article 31B, Section 7 (a) of the Maryland Code.

Edward Lee McNeil was admitted to Patuxent Institution on August 10, 1966, following conviction in the Criminal Court of Baltimore City on a charge of Attempted Rape and Assault on a Police Officer, and sentenced on July 29, 1966 to a term of not more than five (5) years.

Upon admission, the patient was seen by Theodore A. Tasony, M.D., a staff psychiatrist, and in an Admission Note dated September 5, 1966, Dr. Tasony indicated that the patient completely denied the offenses for which he was sentenced. Subsequent to the Admission Note, ten (10) attempts were made to have this patient evaluated psychiatrically, with the patient refusing on each occasion. During the same period, five attempts were made to examine the patient psychologically, the latest one being attempted on February 14, 1972.

In the course of obtaining data from other agencies, the Institution received a copy of a psychiatric examination

done by the Medical Service of the Supreme Bench of Baltimore City, dated July 19, 1966. We were also provided with a Social evaluation from the Childrens' Center, dated June 13, 1960, and a report from the Circuit Court of Baltimore City, Division of Juvenile Causes, dated May 20, 1960. These earlier two reports contained no psychiatric or psychological examination material.

In the psychiatric evaluation done for The Medical Service of The Supreme Bench by Dr. John Sheehan, dated July 19, 1966, Dr. Sheehan stated in his summary that the psychological examination indicated a full-scale I.Q. of 104 and also indicated impulsiveness and vulnerability to anxiety. It also mentioned fantasy preoccupations which have to do with women, blood, high heel shoes, and thighs. The presence of such bizaare fantasies may well indicate a basic schizophrenic process which can only be evaluated by a thorough psychiatric and psychological examination. Unfortunately, we do not have the protocol which accompanied the 1966 psychological examination, nor do we know the tests that were used in that examination. There are also internal contradictions present in the summary. Dr. Sheehan states, "It is difficult to assign the diagnosis to this young man, and he is not anti-social in the sense that he uses society as an enemy to be attacked. His unstable character structure does not permit adequate control when under stress and we do not know enough about his social life — or lack of it. I would suggest the diagnosis of personality pattern disturbance, schizoid type, which encompasses vulnerability stress. This young man is certainy a danger to society." Dr. Sheehan thus indicates his uncertainty about the diagnosis and seemingly contradicts himself by stating that he is not antisocial, and yet is a danger to society.

This, of course, is the very question to which this Institution must address itself in determining whether or not this individual is a defective delinquent, and such determination cannot be made unless a personal interview with the patient is made which would include an estimate of his intelligence, his contact with reality, whether or not a schizophrenic process does exist, or whether any organic factors are present in this patient. These are things which can only be determined by direct interview with the patient. Furthermore, Dr. Sheehan felt that this patient would commit further offenses, and recommended that he be sent to Patuxent Institution for a more intensive study and evaluation, thus indicating that he felt his examination and evaluation required a more detailed psychiatric and psychological investigation. Dr. Sheehan's examination was done on July 19, 1966 as a pre-sentence investigation, and in order to determine the patient's present status, a complete psychiatric and psychological evaluation must be done at the present time. The examination of the Supreme Bench Medical Service is nearly eight (8) years old and certainly should be considered out of date, and any report made, based upon that old examination, would certainly not be considered valid at the present time.

It should be emphasized that Dr. Sheehan, himself, had uncertainty and doubts about this patient's diagnostic and psychiatric picture, and asked to have a more thorough evaluation done. Obviously, based on the information contained in the file in 1966, an evaluation could not have been done at that time. In this regard, I recommend referral to affidavits filed in this case by Giovanni C. Croce, M.D., Associate Director (Psychiatry) and Sigmund H. Manne, Ph.D., Chief Psychologist, both of Patuxent Insti-

tution, regarding psychiatric and psychological examinations.

In Testimony Whereof, I hereunto set my Hand

HAROLD M. BOSLOW, M.D.

As Witness My Hand and Notarial Seal

WAYNE LEE ELLIOTT,

(Seal) Notary Public.

APPENDIX D

CHART OF PETITIONER'S REASONING

Constitution requires an opportunity for a hearing

BUT →

Petitioner is indefinitely confined without a hearing

↓

THEREFORE

↓

equal protection violation

↓

and

↓

no "speedy trial"

↓

and

↓

cruel and unusual punishment

↓

and

↓

involuntary servitude

↑

THEREFORE

↑

[potential of indefinite confinement without treatment]

↑

THEREFORE ←

BECAUSE →

State refused to institute a hearing without a personal examination

↓

EVEN THOUGH

↓

answers to personal questions asked at examination not an absolute prerequisite to diagnosis

↓

SINCE *other sufficient information is available*

AS SHOWN BY

↓

other findings made without information from personal examination

[cannot treat untrusting prisoner]

↑

THEREFORE ←

AND →

Petitioner will not submit to a personal examination

↓

BECAUSE

↓

he has the right to assert his privilege against self-incrimination

↓

SINCE

↓

(1) *disclosures can be used to criminally incriminate him;* and (2) disclosures can be a basis for Patuxent confinement

↓

AND

↓

even complete immunity a bad idea because of "need for mutual trust" (42) and no mutual trust where prisoner forced to talk

This chart is set forth to show the importance of certain factual assumptions (here italicized) to Petitioner's argument.

Also worthy of note is the manner in which the "lack of trust" assertion has a tendency to create a circular argument.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5144

EDWARD LEE McNEIL,

Petitioner,

v.

DIRECTOR, PATUXENT INSTITUTION,

Respondent.

PETITIONER'S REPLY BRIEF

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EDWARD LEE McNEIL,

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DIRECTOR, PATUXENT INSTITUTION,

Respondent.

PETITIONER'S REPLY BRIEF

I. The State's Affidavits

At the outset, Petitioner Edward Lee McNeil respectfully requests the Court to disregard and strike as wholly improper and untimely the following matters in Respondent's Brief, filed herein on April 17, 1972: (a) three affidavits executed April 13, 1972, and attached as Appendices A, B, and C to that Brief and (b) each and every portion of Respondent's Brief based on or related to said affidavits, including, but

not limited to, the arguments presented at pages 16-18, 27-28, 32, 65, 72, and 77. While Petitioner's request would normally be presented in the form of a motion to strike, in view of the fact that Respondent's Brief was due and filed only four days prior to oral argument, Petitioner's request to strike has been incorporated in this Reply Brief.

Each of said affidavits was executed April 13, 1972, four days before Respondent's Brief was due to be filed. These obviously untimely and self-serving statements of opinion from the Director and two staff members at Patuxent Institution were never introduced or admitted into evidence in any court proceeding and were never subject to cross-examination or rebuttal. They represent a wholly improper last-minute effort to prop up Respondent's untenable position that it can confine Petitioner for the rest of his life in an institution for defective delinquents without any judicial hearing whatever, notwithstanding the fact that McNeil's criminal sentence has expired. It is particularly shocking that the State would attempt to circumvent the rules of evidence and the rules of this Court by seeking to submit testimony in the guise of "appendices" to its Brief, where virtually identical testimony by Patuxent staff members has been rejected by two trial courts in Maryland when introduced subject to cross-examination and subject to the right to produce conflicting expert testimony. These Maryland trial-court decisions are discussed at pages 24-28 of Petitioner's Brief.[1]

[1] Respondent's use of affidavits introduced for the first time in this Court should be contrasted with the procedure adopted by Petitioner. Since no hearing has ever been accorded Petitioner in regard to his defective delinquency status, he too was without testimony in his own case to rely upon in this Court. However, testimony had been presented at judicial proceedings involving other Patuxent inmates; that testimony had been subject to confrontation and cross-examination, and it had been formally admitted into evidence. Therefore, both Petitioner and Respondent are properly free to rely upon this testimony in the instant case—and both have done so.

In a similar case in which one side attempted to gild its case at the last moment by filing original evidence in this Court, the Court struck not only those belated documents but also all portions of the brief based thereon. *Lawn v. United States*, 355 U.S. 339, 354 (1958). The same relief should be granted here, and we respectfully request that Respondent be admonished not to refer in oral argument to this blatantly improper hearsay "evidence."

II. The State's Brief

Substantial portions of the State's brief are devoted to aspects of the Patuxent Institution and the Maryland Defective Delinquency statute which are interesting but totally unrelated to McNeil for the simple reason that he has never received the benefits of the diagnosis, judicial hearing and treatment which the State discusses.[2]

We will reply briefly, however, to several points which at least involve this case.

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[2] For example, the State favorably contrasts (pp. 13-18) the Patuxent diagnostic techniques with those in other jurisdictions; discusses (pp. 18-21) the thoroughness of Patuxent's medical procedures and the high expenditures per inmate for diagnosis and treatment; presents (pp. 28-29) miscellaneous statistics about "quartile rankings" of Patuxent inmates on the basis of the length of their sentence; describes (pp. 33-35) the procedural safeguards available under the Maryland statute before one can be classified after hearing as a defective delinquent, and recounts (pp. 8-13) the careful consideration given by the Maryland Legislature to the general problems posed by mentally defective criminals.

The State also claims (pp. 13-15) that the Maryland Code, unlike other federal and state statutes, provides for a diagnosis by a psychiatrist, a psychologist, and a medical doctor, rather than by two psychiatrists or physicians. This fact has nothing whatever to do with this case, since McNeil has never been diagnosed.

1. The State relies (p. 45 n. 10) on Ind. Ann. Stat. 9-3404 for the proposition that a suspected sexual psychopath must answer questions asked by psychiatrists to determine whether or not he is a sexual psychopath under penalty of contempt of court. The State seeks to analogize that statute to the Maryland Code. Although the State tells us that the Indiana statute is "now repealed", it fails to disclose that the statute was repealed because the procedure authorized by it was found to violate the Fifth Amendment privilege against self-incrimination. See *Haskett v. State*, 263 N.E.2d 529 (Ind. 1970). Thus, the prior Indiana and the present Maryland practices are indeed analogous and are both unconstitutional. The State also relies (p. 52) on *State ex rel. Haskett v. Marion County Criminal Court*, 250 Ind. 229, 234 N.E.2d 636, *cert. denied*, 393 U.S. 888 (1968), for the proposition that the "compulsory examination of an accused in a sexual psychopathy action by two physicians" does not violate the privilege against self-incrimination. However, that decision was overruled two years later in *Haskett v. State, supra*.

2. The State claims (p. 26) that the ex parte letter from the Director of Patuxent to the Baltimore City Criminal Court (see Ptr's Brief p. 11) was sent because the Act requires that a report be made to the court within six months of the inmate's arrival, and if diagnosis has not been completed by then, the court is "routinely" notified. The State asserts that the ex parte letter was not sent "in response to" McNeil's letter to the District Court "at or about the same time." Of course, if the letter sent by Patuxent was in fact in response to a statutory demand, it is extraordinary that the letter would be sent surreptitiously, with no notice to McNeil or his counsel. But even more to the point, the sequence of events involved clearly refutes the State's position:

—McNeil arrived at Patuxent on August 10, 1966.
—The six-month period expired on February 10, 1967.

—Over three months later, on May 15, 1967, in the absence of any action by Patuxent, McNeil wrote to the District Court.

—On May 23, 1967, eight days after the mail censor at Patuxent recorded in McNeil's file that he had written the District Court, the Director of Patuxent wrote his "routine" letter to the Baltimore City court.

3. The State claims (pp. 54-55):

> * * * the Maryland Courts, in construing Art. 31B, have held that results of [Patuxent] examinations could probably not be introduced [into evidence in a subsequent criminal trial] without a violation of *Miranda v. Arizona* * * *. In so stating, the Maryland Courts have built an additional barrier against incrimination which is not present in other jurisdictions, which have held that the results of psychiatric tests do not fall within the ambit of *Miranda*.* * *

To the contrary, the court in the case[3] cited by the State to support this claim never reached the *Miranda* issue because that issue had not been raised in the trial court, and in fact suggested in dictum that the *Miranda* warnings probably would *not* have to be given at the Patuxent examinations.

4. The State indicates (p. 65) that an undiagnosed inmate may receive a judicial hearing if the Patuxent staff "feels that there is enough on the record to support the presence or absence of defective delinquency* * *." This is a blatantly incorrect statement. In fact, Patuxent continues in every case—as in this one—to refuse voluntarily to supply the Maryland courts with any data on an inmate who refuses to submit to its psychiatric examinations. It was only when ordered to do so by a Maryland court that in at least one instance Patuxent provided information and a recommendation on the basis of which the court could determine possible status as a defective delinquent (see Ptr's Brief, pp. 24-27).

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[3] *Wise v. Director*, 1 Md. App. 418, 230 A2d 692 (1967), *cert. denied sub nom. Wise v. Boslow*, 390 U.S. 1030 (1968).

5. The State's gloomy warning (p. 67) that the result of granting McNeil a hearing after six years of confinement "will be the frustration of every sexual psychopath statute in the country and chaos in the determination of insanity in criminal cases" has no substance. The Supreme Court of Indiana held two years ago that the privilege against self-incrimination entitles a suspected sexual psychopath to refuse to answer questions at a psychiatric interview conducted to determine whether he is a sexual psychopath. *Haskett v. State*, 263 N.E.2d 529 (Ind. 1970). Other state courts have held that the privilege applies at pretrial psychiatric examinations (see Ptr's Brief p. 52 n. 61), and no frustration, chaos or even confusion has resulted.

6. The State says (p. 78) it is "confident that there is a basis in fact for concluding that non-cooperators are, more probably than not, defective delinquents." Needless to say, the State does not provide a shred of evidence for this speculative presumption. However, since the State appears confident that "there is a basis in fact" for treating inmates who refuse to submit to its psychiatric examinations as defective delinquents, it is totally inexplicable that Patuxent consistently refuses to make such a recommendation to the court. Indeed, it should be emphasized again that it is the court (or a jury) which determines, after hearing, an inmate's status as a defective delinquent—not Patuxent.

7. The very cases cited by the State (p. 56) to justify indefinite civil commitment illustrate that there must be a full hearing prior to such commitment. For example, the state statute allowing commitment of persons exhibiting "psychopathic personality" involved in *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940), as this Court carefully pointed out, required a hearing before commitment. The full hearing required by the federal statute involved in *Greenwood v. United States*, 350 U.S. 366 (1956), is discussed at pages 21-22 of Petitioner's brief. The State cites 123 cases in its brief and yet fails to cite the one case most precisely in point, which holds that absent a full hearing, the State has no right to indefinite commitment

of predicted offenders, whether its confinement procedures are denominated civil or criminal. *Specht v. Patterson*, 386 U.S. 605 (1967).

8. In response to McNeil's equal protection argument, the State answers (pp. 56-58) that it may treat defective delinquents as a recognized class of offenders. Once again, the State ignores the fact that McNeil has never been classified as a defective delinquent, so that he benefits neither from the treatment facilities at Patuxent nor the treatment facilities available to other convicted prisoners who have not been found to be defective delinquents. Further, Patuxent's submission of a diagnostic report on at least one inmate (McKenzie), while it refuses to supply the court with one iota of information on McNeil, constitutes a second violation of equal protection guarantees.

9. The State's concession (p. 58) that at least "orderly expedition", even if not "mere speed", lies at the heart of proper administration of justice stands in stark contrast to its treatment of McNeil. As to McNeil, *after six years* of confinement the State still refuses to submit to the Maryland courts the relevant data it has concerning him, including its observation of him during all that time. By no conceivable means can the State's studied inaction be described as "orderly expedition." It is incredible that the State advances as a reason for this inaction the fact that "therapeutic treatment of mental illness may take a considerable period of time" when it has deprived McNeil of all such treatment.

10. In several places in its Brief (*e.g.*, pp. 55, 51 n. 14), the State claims that McNeil's self-incrimination arguments should be rejected because McNeil, for whom counsel was appointed by this Court on January 24, 1972, has been unable to document any instances in which incriminatory information gathered at diagnostic interviews was used in subsequent criminal proceedings. This Court, of course, has never required such documentation as a prerequisite to sustaining a claim of violation of the privilege against self-incrimination. Instead, the Court has concerned itself with

the dangers of self-incrimination inherent in answering the State's questions and the degree to which State prosecutorial authorities have access to that information. Moreover, it would be virtually impossible for one defendant to prove the extent to which such information had formed a link in the chain of evidence used to convict other defendants.

11. The State says (p. 30) that "the findings of the courts subsequent to *Sas* * * * have held that therapy is available to all at Patuxent Institution and that confinement without treatment would be patently unconstitutional." We agree. McNeil has been confined at Patuxent for six years without treatment. We challenge the State to contradict that statement.

12. The State claims (p. 13) greater safeguards under Maryland law than under federal law. This is simply incorrect. Federal law requires that a *full judicial hearing* be held if a federal prisoner is to be confined after the expiration of his criminal sentence due to any form of mental defectiveness (Ptr's Brief, pp. 21-22).[4]

13. All of the cases cited by the State (pp. 42-45) to support its assertion that the privilege against self-incrimination may not be claimed at a psychiatric examination involved pretrial psychiatric examinations in which the defendant was attempting simultaneously to make use of expert testimony by his own psychiatrists that he was insane while seeking to deny the state the opportunity to have its own experts make similar examinations. On that basis, these courts held that the privilege had been waived. Obviously, no such situation exists here.[5]

---

[4] The same requirement is also contained in the New Jersey statutory procedures cited by the State at page 14 of its brief. *See State v. Lee*, 60 N.J. 53, 286 A.2d 52 (1972). *See also* the Connecticut statutory procedures cited in Petitioner's brief (p. 21 n. 26).

[5] The sharp contrast between that situation and the instant case is illustrated by two decisions reached by the Supreme Court of New Jersey. In *State v. Whitlow*, 45 N.J. 3, 210 A.2d 763 (1965), the court held that the defendant had waived his privilege against self-incrim-

(Cont'd.)

14. The State's discussion (pp. 39-40) of *Jennings v. Mahoney*, 404 U.S. 25 (1971), is disingenuous at best. In language not quoted by the State, this Court said that "there is plainly a substantial question whether the Utah statutory scheme on its face affords the procedural due process required by *Bell v. Burson* [402 U.S. 535 (1971)]." *Id.* at 26. The Court did not have to strike down the statute, however, since the attempted suspension of the petitioner's license had been stayed while he was given a full hearing. McNeil's six-year confinement at Patuxent can hardly be compared to suspension of a license to drive a car. Even prior to expiration of McNeil's criminal sentence, more than a change in the place of confinement was involved. Not only did his referral to Patuxent raise the "obvious but terrifying possibility" that he would be "marooned and forsaken" with mentally ill persons even though he was not,[6] but he has been denied treatment which would have been available had he served his sentence at Hagerstown. The State cannot impose these harmful consequences without a judicial hearing. *Kent v. United States*, 383 U.S. 541 (1966); *Bell v. Burson, supra; Jennings v. Mahoney, supra.*

15. The State seeks (p. 27) to excuse the delay of over two years between Patuxent's third and fourth formal requests that McNeil submit to the State's examinations by claiming, without a record citation, that it made "informal contacts" with McNeil to determine whether he wished to be examined. Not only must this contention be disregarded because unsupported by a record citation (Rule 40(2)), but

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ination at the psychiatric interview by raising the defense of insanity. However, three years later, in *State v. Obstein*, 52 N.J. 516, 247 A.2d 5 (1968), the same court held that the state could *not* require a defendant to submit to a pretrial psychiatric examination where he did not wish to raise an insanity defense at trial. Thus, it is *Obstein*—not *Whitlow*—which presented facts analogous to those here.

[6] *United States ex rel. Schuster v. Herold*, 410 F.2d 1071, 1078-79 (2d Cir.), *cert. denied*, 396 U.S. 847 (1969).

it is in direct contradiction to the procedure outlined by the Chief Psychologist at Patuxent (see Ptr's Brief, p. 11).

16. The State's claim (p. 41) that personal disclosures as to one's mental condition are not testimonial under the Fifth Amendment is incorrect both factually and legally and is rejected by much of the language in *State v. Whitlow, supra,* upon which the State relies (pp. 43, 53). The so-called "mental condition" that Patuxent is attempting to compel the inmate to disclose is perhaps best summed up by Dr. Harvey Kelman, staff psychiatrist at Patuxent, testifying in the *McKenzie* case (see Ptr's Brief, pp. 24-27):

> Now, I need to talk to an individual with regard to their part of the [statutory] definition [of defective delinquency] for several reasons. Although it is true that I have available to me records showing criminal convictions of the patients at the institution, I have no idea of his version or his explanation of what occurred in those cases. * * *
>
> [W]ith regard to that part of the definition the patient may wish to volunteer other information which would lend weight towards or against his having committed other antisocial acts or not committed other antisocial acts, which may not have been tried, may not appear in the record, may not appear on the FBI report, but nevertheless would be important to lending substance either for or against this part of the definition. * * *
>
> [I]n considering that part of the definition I am asked to consider not only criminal convictions that occur on the record and with the record from the FBI or from the courts, as I understand it, but to consider the matter which the law calls antisocial behavior. Now, this behavior may be of numerous varieties. I have no way of knowing the presence or absence of this behavior that may never come to note in anybody's records unless I talk with the patient about it. [Tr. 28-29.]

When this testimony is combined with what the Fourth Circuit said in the *Sas* case about the use that can be made of the

information extracted from the inmate,[7] any attempt to equate this information with blood tests or other non-testimonial disclosures is reduced to vapor.

17. Finally, the State presents (p. 32) to this Court a truly frightening argument:

> The State's right to compel cooperation is based upon the State's need for diagnosis. If the State has a right, it cannot be without means of vindicating it. The means chosen—an indeterminate stay in the diagnostic area of Patuxent until cooperation is obtained—is a necessary and proper means to defeat the desire of undiagnosed defective delinquents to evade treatment by sitting out their sentences.

This is one of the most Orwellian arguments that counsel for Petitioner has ever encountered. Note the assumptions:

—that all those referred to Patuxent are "undiagnosed defective delinquents";

—that the State has a "right" to "compel cooperation";

—that the refusal of cooperation must result from a "desire * * * to evade treatment * * * ", and

—that the inmate's refusal of "cooperation" leads, without any intermediate steps (such as a hearing or

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[7] "The institutional experts who testify for the state are not in a patient-physician relationship with the criminal and may testify as to matters learned from the criminal in interviews and tests, even if the same concerns prior criminal offenses and convictions and admissions of prior antisocial conduct. Simmons v. Director, 227 Md. 661, 177 A.2d 409 (1962); McDonough v. Director, 229 Md. 626, 183 A.2d 368 (1962); * * *. Extensive hearsay regarding the past social, physical, mental and psychiatric and criminal condition and history is admitted at the hearing over objection, since it is deemed that the Act requires the introduction of the same and that the purpose of the law would be defeated unless evidence of antecedent conduct is presented upon which to establish the propensity toward criminal activity. Simmons v. Director, supra; Fairbanks v. Director, 226 Md. 661, 173 A.2d 913 (1961)." *Sas v. Maryland*, 334 F.2d 506, 511 (4th Cir. 1964).

judicial order), to "an indeterminate stay in the diagnostic area" – in other words, for life.

It does not seem to occur to the State that someone referred to Patuxent may *not* be a defective delinquent, with a concomitant right *not* to be treated by the State but instead to serve his debt to society in a regular correctional facility. Nor does it seem to occur to the State that one of its inmates might have a perfectly legitimate, well-founded, and even compelling reason for refusing to "cooperate". And most importantly, it does not seem to occur to the State that the courts, not the staff of a State institution, sentence citizens to confinement for life in this country, and that the Constitution also plays its part.

Respectfully submitted,

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(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

McNEIL *v.* DIRECTOR, PATUXENT INSTITUTION

CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 71-5144. Argued April 20, 1972—Decided June 19, 1972

Petitioner, who was given a five-year sentence, was referred under an *ex parte* order to the Patuxent Institution for examination to determine whether he should be committed for an indefinite term as a defective delinquent. In this proceeding for post-conviction relief he challenges his confinement after expiration of that sentence as violative of due process. Respondent contends that petitioner's continued confinement is justified until petitioner cooperates with the examining psychiatrists and thus facilitates an assessment of his condition. The trial court denied relief, holding that a person confined under Maryland's Defective Delinquency Law may be detained until the statutory procedures for examination and report have been completed, regardless of whether or not the criminal sentence has expired. *Held:* In the circumstances of this case, it is a denial of due process to continue to hold petitioner on the basis of an *ex parte* order committing him to observation without the procedural safeguards commensurate with a long-term commitment. *Jackson* v. *Indiana*, 406 U. S. —; and without affording him those safeguards his further detention cannot be justified as analogous to confinement for civil contempt or for any other reason. Pp. 3-7.

Reversed.

MARSHALL, J., delivered the opinion for a unanimous Court. DOUGLAS, J., filed a concurring opinion.

SUPREME COURT OF THE UNITED STATES

No. 71-5144

Edward Lee McNeil, Petitioner, v. Director, Patuxent Institution. | On Writ of Certiorari to the Court of Special Appeals of Maryland.

[June 19, 1972]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Edward McNeil was convicted of two assaults in 1966, and sentenced to five years' imprisonment. Instead of committing him to prison, the sentencing court referred him to the Patuxent Institution for examination, to determine whether he should be committed to that institution for an indeterminate term under Maryland's Defective Delinquency Law. Md. Code Ann., Art 31B. No such determination has yet been made, his sentence has expired, and his confinement continues. The State contends that he has refused to cooperate with the examining psychiatrists, that they have been unable to make any valid assessment of his condition, and that consequently he may be confined indefinitely until he cooperates and the institution has succeeded in making its evaluation. He claims that when his sentence expired, the State lost its power to hold him, and that his continued detention violates his rights under the Fourteenth Amendment. We agree.

I

The Maryland Defective Delinquency Law provides that a person convicted of any felony, or certain misdemeanors, may be committed to the Patuxent Institution for an indeterminate period, if it is judicially deter-

mined that he is a "defective delinquent." A defective delinquent is defined as:

> "an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment." Md. Code Ann., Art. 31B, § 5.

Defective delinquency proceedings are ordinarily instituted immediately after conviction and sentencing; they may also be instituted after the defendant has served part of his prison term. §§ 6 (b), 6 (c).[1] In either event, the process begins with a court order committing the prisoner to Patuxent for a psychiatric examination. §§ 6 (b), 6 (d). The institution is required to submit its report to the court within a fixed period of time. § 7 (a).[2] If the report recommends commitment, then

[1] But not after he has served all of it. The statute has always provided that no examination may be ordered or held if the person has been released from custody; since 1971 it has also prohibited the examination if the person is within six months of the expiration of sentence. § 6 (c), as amended 1971. The State asserts that about 98% of the referrals to Patuxent are made immediately after conviction. Transcript of Argument, at 27; see Respondent's Brief, at 82 n. 33.

[2] The statute originally required the report to be submitted within six months, or before expiration of sentence, whichever later occurs. Since 1971, it has required a report within six months, or three months before expiration of sentence, whichever *first* occurs. § 7 (a), as amended 1971. The state courts have construed the statute to permit extension of the allowable time, however, in the case of a noncooperative defendant who resists examination. *State* v. *Musgrove*, 241 Md. 521, 217 A. 2d 247 (1966); *Mullen* v. *Director*, 6 Md. App. 120, 250 A. 2d 281 (1969).

a hearing must be promptly held, with a jury trial if requested by the prisoner, to determine whether he should be committed as a defective delinquent. § 8. If he is so committed, then the commitment operates to suspend the prison sentence previously imposed. § 9 (b).

In *Murel* v. *Baltimore Court, post,* several prisoners who had been committed as defective delinquents sought to challenge various aspects of the criteria and procedures that resulted in their commitment; we granted certiorari in that case together with this one, in order to consider together these challenges to the Maryland statutory scheme. For various reasons we now decline to reach those questions, see *Murel, post.* But Edward McNeil presents a much more stark and simple claim. He has never been committed as a defective delinquent, and thus he has no cause to challenge the criteria and procedures that control a defective delinquency hearing. His confinement rests wholly on the order committing him for examination, in preparation for such a commitment hearing. That order was made, not on the basis of an adversary hearing, but on the basis of an *ex parte* judicial determination that there was "reasonable cause to believe that the defendant may be a defective delinquent." [3] Petitioner does not challenge in this Court the power of the sentencing court to issue such an order in the first instance, but he contends that the State's power to hold him on the basis of that order has expired. He filed a petition for state post-conviction relief on this ground, *inter alia,* pursuant to Md. Code Ann., Art. 27, § 645A. The trial court denied relief, holding that "a person

[3] Petitioner's Brief, at 6 n. 5; see Art. 31B, § 6 (b): request for examination is made to Court "on any knowledge or suspicion of the presence of defective delinquency in such person." It appears that in this case the trial court issued the order *sua sponte;* prior to sentencing he had ordered a psychiatric evaluation by the court's medical officer, who in turn recommended referral to Patuxent for further evaluation and treatment.

referred to Patuxent under Section 6, Article 31B for the purpose of determining whether or not he is a defective delinquent may be detained in Patuxent until the procedures for such determination have been completed regardless of whether or not the criminal sentence has expired." App. 34. The Court of Appeals of Maryland denied leave to appeal. App. 37. We granted certiorari, 404 U. S. 999 (1971).

II

The State of Maryland asserts the power to confine petitioner indefinitely, without ever obtaining a judicial determination that such confinement is warranted. It advances several distinct arguments in support of that claim.

A. First, the State contends that petitioner has been committed merely for observation, and that a commitment for observation need not be surrounded by the procedural safeguards (such as an adversary hearing) that are appropriate for a final determination of defective delinquency. Were the commitment for observation limited in duration to a brief period, the argument might have some force. But petitioner has been committed "for observation" for six years, and on the State's theory of his confinement there is no reason to believe it likely that he will ever be released. A confinement which is in fact indeterminate cannot rest on procedures designed to authorize a brief period of observation.

We recently rejected a similar argument in *Jackson* v. *Indiana*, when the State sought to confine indefinitely a defendant who was mentally incompetent to stand trial on his criminal charges. The State sought to characterize the commitment as temporary, and on that basis to justify reduced substantive and procedural safeguards. We held that because the commitment was permanent in its

practical effect, it required safeguards commensurate with a long-term commitment. — U. S. —, — (1972). The other half of the *Jackson* argument is equally relevant here. If the commitment is properly regarded as a short-term confinement with a limited purpose, as the State suggests, then lesser safeguards may be appropriate, but by the same token, the duration of the confinement must be strictly limited. "[D]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." — U. S., at —. Just as that principle limits the permissible length of a commitment on account of incompetence to stand trial, so it also limits the permissible length of a commitment "for observation." We need not set a precise time limit here; it is noteworthy, however, that the Maryland statute itself limits the observation period to a maximum of six months. While the state courts have apparently construed the statute to permit extensions of time, see n. 2, *supra*, nevertheless the initial legislative judgment provides a useful benchmark. In this case it is sufficient to note that the petitioner has been confined for six years, and there is no basis for anticipating that he will ever be easier to examine than he is today. In these circumstances, it is a denial of due process to continue to hold him on the basis of an *ex parte* order committing him for observation.

B. A second argument advanced by the State relies on the claim that petitioner himself prevented the State from holding a hearing on his condition. The State contends that, by refusing to talk to the psychiatrists, petitioner has prevented them from evaluating him, and made it impossible for the State to go forward with evidence at a hearing. Thus, it is argued, his continued confinement is analogous to civil contempt; he can terminate the confinement and bring about a hearing at any

time by talking to the examining psychiatrists, and the State has the power to induce his cooperation by confining him.

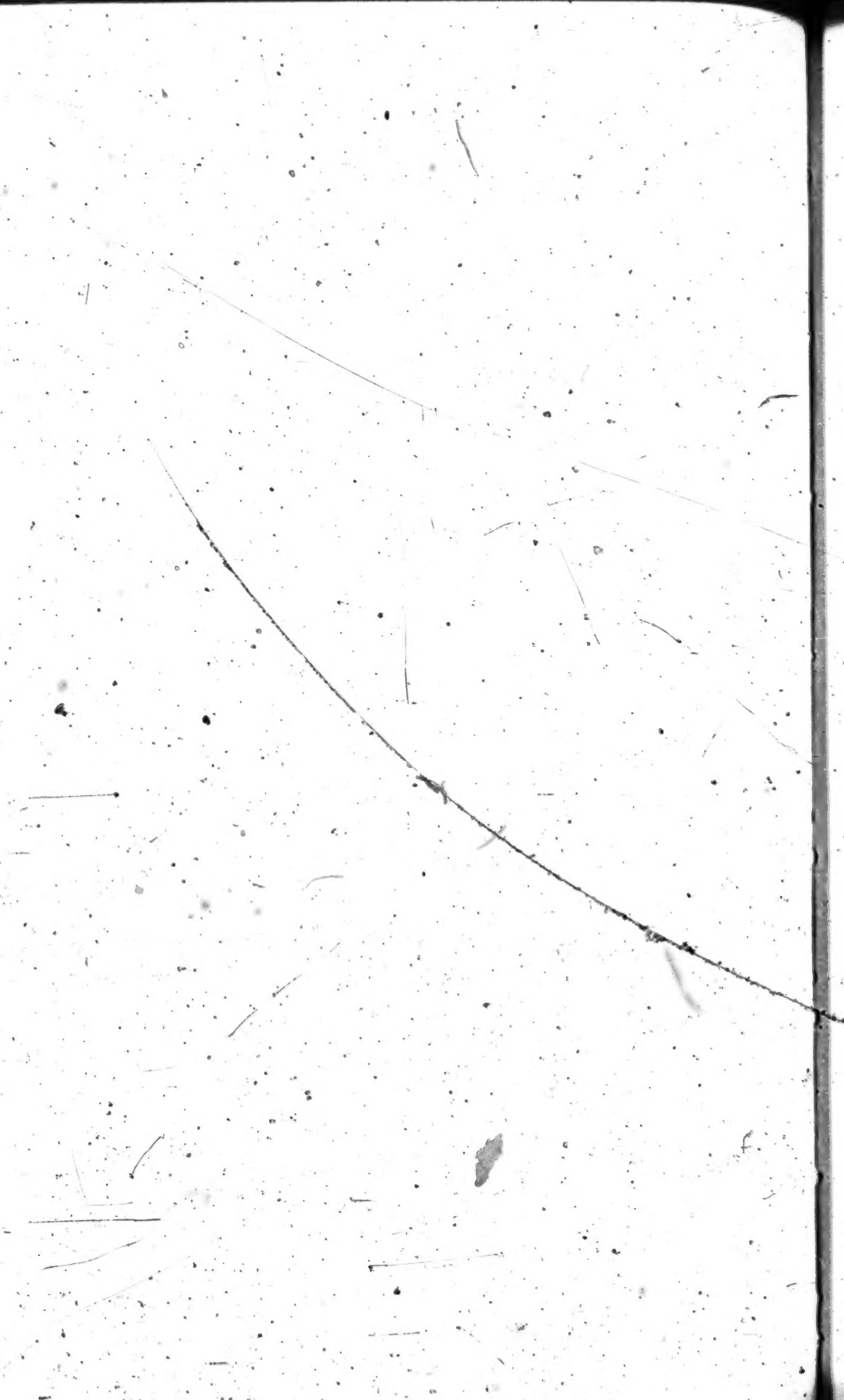
Petitioner claims that he has a right under the Fifth Amendment to withhold cooperation, a claim we need not consider here. But putting that claim to one side, there is nevertheless a fatal flaw in the State's argument. For if confinement is to rest on a theory of civil contempt, then due process requires a hearing to determine whether petitioner has in fact behaved in a manner that amounts to contempt. At such a hearing it could be ascertained whether petitioner's conduct is willful, or whether it is a manifestation of mental illness, for which he cannot fairly be held responsible. *Robinson* v. *California*, 370 U. S. 660 (1962). Civil contempt is coercive in nature, and consequently there is no justification for confining on a civil contempt theory a person who lacks the present ability to comply. *Maggio* v. *Zeitz*, 333 U. S. 56 (1947). Moreover, a hearing would provide the appropriate forum for resolution of petitioner's Fifth Amendment claim. Finally, if the petitioner's confinement were explicity premised on a finding of contempt, then it would be appropriate to consider what limitations the Due Process Clause places on the contempt power. The precise contours of that power need not be traced here. It is enough to note that petitioner has been confined, potentially for life, although he has never been determined to be in contempt by a procedure that comports with due process. The contempt analogy cannot justify the State's failure to provide a hearing of any kind.

C. Finally, the State suggests that petitioner is probably a defective delinquent, because most noncooperators are. Hence, it is argued, his confinement rests not only on the purposes of observation, and of penalizing contempt, but also on the underlying purposes of the Defective Delinquency Law. But that argument proves too

much. For if the Patuxent staff was prepared to conclude, on the basis of petitioner's silence and their observations of him over the years, that petitioner is a defective delinquent, then it is not true that he has prevented them from evaluating him. On that theory, they have long been ready to make their report to the Court, and the hearing on defective delinquency could have gone forward.

III

Petitioner is presently confined in Patuxent without any lawful authority to support that confinement. His sentence having expired, he is no longer within the class of persons eligible for commitment to the Institution as a defective delinquent. Accordingly, he is entitled to be released. The judgment below is reversed, and the mandate shall issue forthwith.



SUPREME COURT OF THE UNITED STATES

No. 71–5144

Edward Lee McNeil, Petitioner, v. Director, Patuxent Institution. | On Writ of Certiorari to the Court of Special Appeals of Maryland.

[June 19, 1972]

MR. JUSTICE DOUGLAS, concurring.

This is an action in the Maryland courts for post-conviction relief which was denied, with no court making a report of its decision. The case is here on a petition for writ of certiorari which we granted. 404 U. S. 999. We reverse the judgment below.

McNeil was tried and convicted in a Maryland court for assault on a public officer and for assault with intent to rape. He took the stand and denied he had committed the offenses. He had had no prior criminal record. The sentencing judge asked for a psychiatric evaluation of the accused, though neither side at the trial had raised or suggested any psychiatric issues. A medical officer examined him and recommended that he be considered for evaluation and treatment at Patuxent Institution, a state psychiatric agency.

The court sentenced McNeil to "not more than five years" to prison in Hagerstown [1] and without modifying or suspending that sentence ordered him referred to

[1] Under Maryland law that sentence was subject to statutory reductions for good behavior, industrial or agricultural work, and satisfactory progress in education and vocational courses. Md. Ann. Code Art. 27, § 700 (1971).

McNeil would have been eligible for parole after one-fourth of the term or a little over one year.

Patuxent. Under Maryland law a defendant convicted of any felony or certain misdemeanors may be referred to Patuxent for determination whether he is a "defective delinquent." Md. Ann. Code, Art. 31B (1971). A "defective delinquent" is defined in Art. 31B, § 5, as "an individual who, by the demonstration of persistent aggravated anti-social or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment."

Under Art. 31B, the staff—which includes a psychiatrist, a psychologist, and a physician—examines the person and "shall state their findings" as to defective delinquency in a written report to the court. Art. 31B, § 7 (a). And it is provided that once transferred to Patuxent, the person in question shall remain there "until such time as the procedures . . . for the determination of whether or not said person is a defective delinquent have been completed, without regard to whether or not the criminal sentence to which he was last sentenced has expired." [2] Art. 31B, § 6 (e) (1971 Supp.).

The examination normally entails psychiatric inter-

[2] At the time of McNeil's referral, the Act required that the report be filed no later than six months from the date he was transferred to Patuxent or before expiration of his sentence, whichever last occurred. 3 Md. Code Art. 31B, § 7 (a) (1957 ed. 1966 Supp.). An amendment effective July 1, 1971, required that the report be filed no later than six months from the date he was transferred to Patuxent or three months before equation of his sentence, whichever occurs first. Art. 31B, § 7 (a) (1971 Supp.).

views and evaluation, psychological tests, sociological and social work studies, and review of past history and records, including police, juvenile, penal and hospital records. Personal interviews include a series of questions to elicit and to determine the past criminal record, antisocial and criminal behavior of the individual.

If the report shows that he should not be classified as a defective delinquent, he is retained in custody under his original sentence with full credit given for the time confined at Patuxent. Art. 31B, § 7 (a) (1971 Supp.). If the report says that he should be classified as a defective delinquent, a hearing is held at which the defendant is entitled to counsel and a trial by jury. Art. 31B, § 8.

McNeil, though being at Patuxent beyond the term of five years for which he was sentenced, has never had such a hearing for he has never been declared a "defective delinquent."[3] He has not been so declared and on the other hand has not been cleared, because he has refused on at least 15 separate occasions to submit to the psychiatric tests and questions. Nor has he received in the interim any rehabilitative treatment or training. The State indeed intends to keep him there indefinitely, as long as he refuses to submit to psychiatric or psychological examinations.[4]

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[3] Detention beyond the expiration of court-imposed sentences occurs in Communist China where "public security organs [have] the authority to impose as well as administer punishment" and "the discretionary power to extend the duration of imprisonment beyond the original sentences." Shao-chuan Leng, Justice in Communist China 34 (1967).

[4] In the District Court proceedings in *Murel* v. *Baltimore City Criminal Court, post,* at —, Dr. Boslow, the Director of Patuxent, testified:

"[The Court] . . . Take the case of a person who is referred for diagnosis and he fails, let us say, 100 per cent, to cooperate;

McNeil's refusal to submit to that questioning is not quixotic; it is based on his Fifth Amendment right to be silent. McNeil remains confined without any hearing whatsoever that he has a propensity toward criminal activity and without any hope of having a hearing unless he surrenders his right against self-incrimination.[5]

The Fifth Amendment is applicable to the States by reason of the Fourteenth. *Malloy* v. *Hogan*, 378 U. S. 1.

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he won't talk to anybody, he won't undergo any tests, he won't participate, though I don't think he gets group therapy.

"[Dr. Boslow] No, sir.

"[The Court] But he will do absolutely nothing and will take no advantage of whatever opportunity if any there may be.

"He, therefore, assuming that the law is valid, and assuming that the administration in that respect is supportable, could he remain there indefinitely unclassified? Is that correct?

"'[Dr. Boslow] Under the present state of things, yes." CA 4 App. I:311.

[5] As stated in a provocative and searching study in Virginia, "Certainly, a prisoner is not entitled to all the constitutional rights enjoyed by free citizens, but the burden of showing what restrictions are necessary for the preservation of prison order should fall upon prison officials. Widespread, sweeping denials of freedom should not be tolerated. Ideally, the legislative and executive branches of government should decide the extent to which liberty must be denied. No organ of government is better suited than the legislature to consider the penological developments of the last few decades in order to determine the extent to which restrictive practices are warranted. But after legislative command or in its absence, the courts must decide whether the balance of competing interests effected by legislative compromise or executive fiat comports with specific constitutional guarantees and traditional notions of due process. In this context the 'hands-off doctrine' has no place. The judiciary functions as more than a final arbiter; it has a responsibility for educating the public and, where it fails to act, it functions to legitimize the status quo. The simple failure of the courts to review prison conditions blunts the success of important constitutional inquiries, impedes the flow of information and encourages abuse." Hirschkop & Millemann, The Unconstitutionality of Prison Life, 55 Va. L. Rev. 795, 835–837 (1969).

The protection extends to refusal to answer questions where the person "has reasonable cause to apprehend danger from a direct answer." *Hoffman* v. *United States*, 341 U. S. 479, 486; see *Spevack* v. *Klein*, 385 U. S. 511. The questioning of McNeil is in a setting and has a goal pregnant with both potential and immediate danger. To be labelled a "defective delinquent," McNeil must have demonstrated a "persistent aggravated antisocial or criminal behavior" and "a propensity toward criminal activity." Art. 31B, § 5.

McNeil was repeatedly interrogated not only about the crime for which he was convicted but for many other alleged antisocial incidents going back to his sophomore year in high school. One staff member after interviewing McNeil reported: "He adamantly and vehemently denies, despite the police reports, that he was involved in the offense"; "Further questioning revealed that he had stolen some shoes but he insisted that he did not know that they were stolen . . . "; ". . . but in the tenth grade he was caught taking some milk and cookies from the cafeteria"; "He consistently denies his guilt in all these offenses"; "He insisted that he was not present at the purse snatching"; "He was adamant in insisting on this version of the offense despite the police report which was in the brief and which I had available and discussed with him"; "He continued his denial into a consideration of a juvenile offense . . . "; "He denies the use of all drugs and narcotics"; ". . . I explained to him that it might be of some help to him if we could understand why he did such a thing but this was to no avail."

Some of the questioning of McNeil was at a time when his conviction was on direct appeal or when he was seeking post-conviction relief. Concessions or confessions obtained might be useful to the State on a retrial or might vitiate post-conviction relief. Moreover, the

privilege extends to every "link in a chain of evidence sufficient to connect" the person with a crime. *Malloy* v. *Hogan*, 378 U. S., at 13. Whether or not a grant of immunity would give the needed protection in this context is irrelevant, because we are advised that there is no such immunity under state laws.

Finally, the refusal to answer results in severe sanctions, contrary to the constitutional guarantee.

First, the staff refuses to diagnose him, no matter how much information they may have, unless he talks. The result is that he never receives a hearing and remains at Patuxent indefinitely.

Second, if there is no report on him, he remains on the receiving tier indefinitely and receives no treatment.

Third, if he talks and a report is made and he is committed as a "defective delinquent," he is no longer confined for any portion of the original sentence. Art. 31B, § 9 (b). If he does not talk, McNeil's sentence continues to run until it expires and yet he is kept at Patuxent indefinitely. We are indeed advised by the record in the *Murel* case that 20% of Patuxent inmates at that time were serving beyond their expired sentences and of those paroled between 1955 and 1965, 46% had served beyond their expired sentences.

Whatever the Patuxent procedures may be called—whether civil or criminal—the result under the Self-Incrimination Clause of the Fifth Amendment is the same. As we said in *In re Gault*, 387 U. S. 1, 49–50, there is harm and self-incrimination whenever there is "a deprivation of liberty;" and there is such a deprivation whatever the name of the institution, if a person is held against his will.

It is elementary that there is a denial of due process when a person is committed or, as here, held without a hearing and opportunity to be heard. *Specht* v. *Patterson*, 386 U. S. 605; *Humphrey* v. *Cady*, 405 U. S. 504.

McNeil must be discharged forthwith.